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Supreme Ct. U.S.

No. _____ 061698 JUN 20 2007

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In The

# Supreme Court of the United States

JOHN BAXTER HAMILTON,

*Petitioner,*

v.

RANDALL G. WORKMAN, in his capacity as Warden, Oklahoma State Penitentiary,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Tenth Circuit misapplied Supreme Court precedent established in *United States v. Cronic*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984) by holding Petitioner was not denied effective assistance of counsel when the expert presented by his attorneys testified most probably Petitioner was guilty of the first degree murder of his wife?

2. Whether Petitioner received ineffective assistance of counsel when trial counsel presented a "defense" expert witness who testified that most likely Petitioner was guilty of first degree murder, when trial counsel was deceived by the expert about what his testimony would be?

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## BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

This Petition seeks review of a judgment entered by a United States Court of Appeals. John Baxter Hamilton was convicted of Murder in the First Degree in Oklahoma County, Oklahoma, Case No. CF-2001-1147. *Judgment and Sentence* was entered on January 8, 2002. Petitioner then timely filed his *Notice of Intent to Appeal* and *Petition in Error* that same day, alleging ineffective assistance of counsel as Proposition No. 6.

On September 2, 2003, Justice Johnson, writing for the Oklahoma Court of Criminal Appeals, affirmed the *Judgment and Sentence* and rejected Petitioner's claim of ineffective assistance of counsel in Case No. F-2002-35 (Lumpkin, J., and Chapel, J., specially concurring) (App. 60).

Petitioner invoked the jurisdiction of the United States District Court for the Western District of Oklahoma through filing his *Petition for Writ of Habeas Corpus* on October 21, 2004 pursuant to Title 28. United States Code § 2254 in case No. CIV-04-1392-T. A *Report and Recommendation* was filed by United States Magistrate Judge Doyle G. Argo on November 10, 2005 suggesting that the *Petition* be denied (App. 24). The *Report and Recommendation* was then adopted on May 17, 2006 by United States District Judge Ralph G. Thompson in his *Order* (App. 14).

On June 15, 2006, the Petitioner filed his *Notice of Intent to Appeal*, and concurrently his *Application for Certificate of Appealability,* pursuant to 28 U.S.C. § 2253(c)(2) in the United States Court of Appeals for the Tenth Circuit, Case No. 06-6212. That Application was denied on February 22, 2007 (App. 1).

On March 6, 2007, the Petitioner filed his *Petition for Rehearing and Request for En Banc Consideration*. That Petition was denied on March 23, 2007 (App. 93).

Petitioner now seeks review of the lower court judgment and invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 2254(b) and Rule 10(a) of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitutional Provisions

United States Constitution, amend. VI

### Federal Statutes

28 U.S.C. § 2254

28 U.S.C. § 2253

### Federal Rules

Rule 10 of the Rules of the Supreme Court of the United States

### State Statutes

Okla. Stat. Tit. 21, § 701.7

Okla. Stat. Tit. 22, § 1051

## STATEMENT OF THE CASE

This case raises important questions related to ineffective assistance of counsel based upon damaging and prejudicial evidence in the form of defense expert witness testimony. The Tenth Circuit held that under the standard established by *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffectiveness claim cannot be predicated upon the testimony of an expert witness at trial, no matter how damaging, if the defense attorney was deceived by the expert, and thus not "at fault."

As a primary issue, in its analysis in the instant case, the lower court erroneously applied the *Strickland* factors for ineffective assistance of counsel when it misconstrued Petitioner's claim of ineffective assistance of counsel as a claim for ineffective assistance of an expert witness, and rejected the claim on that basis.

As a secondary and related issue, this holding is in conflict with other decisions from the Ninth and Sixth Circuits, which hold that damaging and prejudicial content of the testimony of an expert witness at trial can be the grounds for a claim ineffective assistance of counsel. Both of these issues merit further review.

## ARGUMENT

### I. FACTUAL BACKGROUND.

The Petitioner, Dr. John Baxter Hamilton, was charged and convicted in Oklahoma County, Oklahoma with the first degree murder of his wife, Susan Hamilton. The State's theory of the case was that Dr. Hamilton went home after performing surgery at Mercy Hospital and

committed the murder, and then returned to the hospital and performed a second surgery. Dr. Hamilton testified that he went home after the second surgery and found his wife's body in a pool of blood in the master bathroom. Discovery and pretrial investigation made clear the evidence at trial would focus upon blood stain pattern analysis of Dr. Hamilton's clothing and whether the stains were caused during the assault, or whether they resulted from innocent interaction with the blood pool after Susan Hamilton's death.

As a result, defense counsel retained bloodspatter expert Tom Bevel. Use of Tom Bevel by the defense in a criminal case was risky from the outset. Tom Bevel had been a detective with the Oklahoma City police department for twenty-seven years, most recently in the crime lab as a forensic crime scene reconstructionist and blood stain pattern analysis expert. After retirement, Bevel opened his own forensic consulting business, but his primary client was still the Oklahoma County district attorney's office. At the time he was working on the Hamilton case, Bevel was actively engaged in pretrial work as an expert for the prosecution in several other Oklahoma County murder cases. After he had been retained by Dr. Hamilton's defense attorneys, but without their knowledge, Bevel recommended that the State retain his colleague, co-author, and friend Ross Gardner as the State's blood spatter expert for the Hamilton case.

The risk of using Bevel as a defense witness could have been avoided altogether. On direct appeal to the Oklahoma Court of Criminal Appeals, Dr. Hamilton presented evidence (in the form of an affidavit from John T. Wilson, former head of the Kansas City Missouri police department crime lab) that could have completely undermined

the State's forensic case. Counsel did not consider alternative experts, but relied instead exclusively upon Tom Bevel. The result was predictable.

On direct examination Bevel offered some minor criticisms of Ross Gardner's opinions. Then on cross-examination by the State, Tom Bevel testified that the blood stains inside Dr. Hamilton's shirt sleeve were most likely caused when John Hamilton killed his wife. There was no test of the State's forensic case, and Dr. Hamilton was found guilty of Murder in the First Degree and sentenced to life imprisonment without parole, a fine of $10,000.00, and an $11,104.00 incarceration fee.

On direct appeal the Oklahoma Court of Criminal Appeals denied relief and affirmed the judgment and sentence. Petitioner then filed his *Petition for Writ of Habeas Corpus* under 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma and was granted an evidentiary hearing on his ineffective assistance of counsel claims. At that hearing, conducted on October 12, 2005, David Ogle, one of the trial lawyers for John Hamilton, testified that he retained Tom Bevel as the defense blood spatter expert. Mr. Ogle testified that prior to trial, he had detailed discussions with Mr. Bevel concerning the physical evidence in the case, including a blood stain located inside Dr. Hamilton's shirt sleeve. Mr. Bevel indicated that there were three possible causes for the stain. The stain could have resulted from Dr. Hamilton striking his wife in the head with a blunt instrument. Another possible cause for the stain was Dr. Hamilton's interaction with Susan Hamilton after discovery of her body and attempting to perform CPR. Finally, the stain could have been caused through innocent interaction with the blood pool after Susan Hamilton's death. (Transcript of

October 12, 2005 hearing at pp. 62-63). Mr. Ogle testified that [Tom Bevel] "felt comfortable in presenting testimony that that type of blood stain in the right sleeve could be caused by, what I will define as, innocent conduct." *Id.* at 63-64.

Mr. Ogle also testified that prior to trial, Mr. Bevel had indicated that the stain inside Dr. Hamilton's sleeve was consistent with the administration of CPR. At trial, however, Bevel testified to the exact opposite: that the stain was *not* consistent with CPR. Mr. Ogle testified at the evidentiary hearing that had the defense known what Bevel's testimony would be in this regard, they would not have presented him as a witness. (Transcript of October 12, 2005 hearing at pp. 66-67). Mr. Ogle also testified that the defense had no idea that Mr. Bevel would testify at trial that the stain inside the sleeve would be most consistent with a blunt instrument being applied to Mrs. Hamilton's head. (Transcript of October 12, 2005 hearing at p. 67).

Defense attorney Mack Martin's testimony at the October 12, 2005 hearing verified that the defense had been deceived by Tom Bevel. Mr. Martin also testified that prior to trial, Bevel had indicated the blood stain inside the sleeve was consistent with the administration of CPR. Had he known that Bevel would testify at trial it was not consistent with CPR, the defense would not have put Bevel on the stand. (Transcript of October 12, 2005 hearing at pp. 94-95). When Bevel testified at trial that the blood stain found in John Hamilton's shirt sleeve was "most consistent" with Dr. Hamilton striking Susan Hamilton in the head with a blunt instrument, this came as a complete surprise to Mr. Martin. (Transcript of October 12, 2005 hearing at p. 97).

The evidence at Petitioner's trial which so surprised defense counsel was Bevel's opinion that the state's witness had missed a pattern on the inside of Dr. Hamilton's shirt sleeve. According to Bevel this stain would be consistent with Dr. Hamilton hitting Susan Hamilton with his fist, smashing her face into the floor, or "holding a blunt instrument in his hand and beating her skull in." (Trial Transcript XII, pp. 126-127). In his opinion, the "most probable" cause of the stain was Dr. Hamilton striking Susan Hamilton in the head with a blunt instrument. *Id.* This was contrary to what Mr. Bevel had told defense counsel prior to trial, and it caused the defense to present Bevel as a witness when otherwise they would not have called him. (Transcript of October 12, 2005 hearing at p. 97). After these opinions were offered by Bevel during "cross examination," Mr. Martin was not prepared to perform an effective redirect examination. (Transcript of October 12, 2005 hearing at p. 59-60). Mr. Bevel was the last witness that testified at trial.

On appeal, Petitioner contended he received ineffective assistance of counsel as a result of trial counsel's use of Tom Bevel and the devastating testimony he provided at trial. Bevel's testimony was the most damaging evidence offered against Petitioner, and it was offered by an expert called by the defense. It is this act of ineffective assistance of counsel upon which this Petition turns.

## II. The Tenth Circuit misapplied Supreme Court precedent established in *United States v. Cronic*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984) by ignoring a breakdown in the adversary system, simply because such breakdown was not trial counsel's fault.

The Magistrate, the District Court, and the Tenth Circuit Panel relying upon the Magistrate misconstrued

Petitioner's argument and rendered a decision inconsistent with *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984) in denying the Application for Post-Conviction Relief. The Courts below mistakenly construed Dr. Hamilton's claim as a claim based upon ineffective *witness* assistance:

> . . . We deny Petitioner's request for a COA for substantially the same reasons set forth in the Magistrate Judge's well reasoned Report and Recommendation. See aplt. App., Tab 4 at 73-82. Specifically, we agree with the following analysis of the magistrate judge:
>
> > Counsel believed that Mr. Bevel would opine that the stain was consistent with either Petitioner's involvement or innocent interaction, without saying which was more probable. Accordingly, when counsel elected to call Mr. Bevel as a witness, they had no knowledge that his testimony would be inconsistent with Petitioner's defense, despite having conducted adequate inquiry. . . . the undersigned cannot conclude that utilizing a witness after asking the pertinent questions, conducting the necessary investigation, and receiving answers consistent with the theory of defense fell below an objective standard of reasonableness. . . . Because counsel's actions were not objectively unreasonably, Petitioner has failed to establish that the application of *Strickland* by the Oklahoma Court of Criminal Appeals was unreasonable
> >
> > . . .
> >
> > To the extent the Petition can be construed as arguing that any ineffective performance by Mr. Bevel should be imputed to trial

> counsel, the claim must fail as well. The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. . . . The United States Supreme Court has never recognized the right to effective assistance of expert witnesses distinct from the right to effective counsel. *Id.* at 78-80 (footnote and citations omitted).

(App. 8-9).

The panel determined that Petitioner was contending that he received ineffective assistance from an expert witness, and rejected this as a basis for relief. To the contrary, the Petitioner did not argue at any time that he received ineffective assistance of an expert witness, and further believes that Mr. Bevel accomplished *precisely* what he intended to accomplish: Dr. Hamilton's conviction. It was undisputed that Mr. Bevel deceived trial counsel concerning the ultimate opinions he would provide at trial. As a result of this deceit, *both* sides in the case presented evidence that most likely Dr. Hamilton was guilty of the First Degree Murder of his wife. This breakdown in the adversarial process was caused by *counsel's* ineffectiveness in putting the expert witness on the stand, and failure to investigate alternative expert witnesses. It should not matter that counsel's ineffectiveness occurred because trial counsel was tricked by the expert witness they selected.

It is not disputed that trial counsel for John Hamilton was experienced and skillful and in many aspects of the case provided excellent representation. The problem was that counsel's performance was so deficient in presentation of Mr. Bevel's testimony that Dr. Hamilton was left with no defense at all. The question of counsel's general

skill or experience is irrelevant to the Constitutional inquiry mandated by the Sixth Amendment:

> Of course, the type of breakdown in the adversarial process that implicates the 6th Amendment is not limited to counsel's performance as a whole – *specific areas and omissions may be the focus of a claim of ineffective assistance as well.* See *Strickland v. Washington*, 466 U.S. 668, 693-696, 104 S.Ct. 2052, 2067-2069, 80 L.Ed.2d 674.

*United States v. Cronic*, 466 U.S. 648, fn. 20 at 657 (1984) [emphasis supplied].

In the instant case, Dr. Hamilton was sacrificed by the opinions of two "expert" witnesses (one called by the defense) that the blood spatter demonstrated he was guilty of First Degree Murder. There was no contest between adversaries. The defense and the prosecution offered evidence which left the jury with no choice but to convict Dr. Hamilton for the First Degree Murder of his wife. It should not matter that this breakdown in the adversary system occurred because the defense expert witness deceived trial counsel.

Nevertheless, Justice Argo's *Report and Recommendation* states that "because counsel's actions were not objectively unreasonable, Petitioner has failed to establish that the application of *Strickland* by the Oklahoma Court of Criminal Appeals was unreasonable. Accordingly, Petitioner is not entitled to habeas corpus relief on this claim." (App. 48). The District Court and the Tenth Circuit adopted this application of *Strickland*, which Petitioner submits remains erroneous.

The Tenth Circuit's decision ignores a fundamental component of effective assistance of counsel: adversarial

testing of the prosecution's case. The constitutional problem in Dr. Hamilton's trial was that there was no test of the State's blood stain pattern theory. The case was based entirely upon circumstantial evidence, and the only way the State could obtain a conviction was through the use of expert witness testimony concerning the blood spatter evidence. Instead of providing an adversarial test of that evidence, trial counsel unwittingly joined in proving the State's case. When this occurred, Dr. Hamilton was left with no defense at all. This Court has described this type of breakdown of the criminal justice process in this way:

> When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the 6th Amendment has occurred. *But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.* As Judge Wyzanski has written: 'while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.' *U.S. ex rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom. *Sielaff v. Williams,* 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

*Cronic*, 466 U.S. 648, 656-657 (1984) [emphasis supplied].

In *Cronic*, this Court recognized a defendant in a criminal case can be deprived of effective assistance of counsel, even when the failure cannot be fairly attributed to the attorney. The Court cited *Powell v. Alabama*, 287

U.S. 45 (1932)[1] and held certain circumstances undermine the reliability of the finding of guilt. The Court stated:

> Circumstances of that magnitude may be present on some occasion, when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

*Cronic*, 466 U.S. at 659. Dr. Hamilton's case warrants the presumption of prejudice because the chances that any lawyer could provide effective assistance when deceived by the expert witness about inculpatory evidence is exceedingly remote.

Furthermore, in *Cronic* the Court explained why the presumption of prejudice is sometimes appropriate:

> The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. *Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.*

*Id.*, 466 U.S. at 659 [emphasis provided].

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[1] In *Powell*, this Court reversed the Judgments for seven defendants convicted of rape because the trial court appointed "all the members of the bar" to act as defense counsel, without specifically appointing a named attorney and making him responsible. 287 U.S. at 53.

In Dr. Hamilton's case counsel did not subject the prosecution's case to meaningful adversarial testing, but assisted the prosecution in proving its forensic case. Both sides offered evidence Dr. Hamilton was guilty, there was a denial of Sixth Amendment rights, and the results of the trial are presumptively unreliable.

In holding that the testimony of the expert witness, no matter how damaging, cannot be the grounds for a claim of ineffective assistance of counsel, the lower court has ignored that aspect of the Sixth Amendment which requires adversarial testing of the state's case:

> In every case, the Court should be concerned with whether, despite the strong presumption of reliability, the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

*Strickland v. Washington*, 466 U.S. at 697. Further, the lower courts misapplied *Strickland* by using it as a vehicle for dismissing Petitioner's claims on the grounds that they are actually a claim for ineffective assistance of an expert witness. The conduct of the expert cannot be divorced from the conduct of the lawyers that called him as a witness. A *Strickland* analysis, properly applied to the case at hand and analyzed from the standpoint of objective reasonableness establishes that Petitioner was denied effective assistance of counsel and that the failure prejudiced his defense.

## III. A conflict exists between circuit court decisions on the issue of whether a claim for ineffective assistance of counsel can be based on ineffective use of a defense expert witness.

As a matter of fundamental fairness, it should not matter whether trial counsel was ineffective because they were deceived, or because they did not adequately prepare. The result for Petitioner was the same, a trial in which the jury had no choice but to convict him of the first degree murder of his wife. The District Court and the Appellate Court erred in upholding the Oklahoma Court of Criminal Appeal's unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). In holding that the presentation of Bevel's testimony could not form the basis for an ineffective assistance of counsel claim, the Tenth Circuit made a decision in conflict with other circuit court decisions on this issue. The Tenth Circuit adopted that portion of the Magistrate's Report and Recommendation which held because defense counsel asked the right questions but were deceived by the expert, their actions were not objectively unreasonable and thus not ineffective. (App. 46-49). This holding suggests that the conduct of a defense expert witness in providing surprise testimony that corroborates the State's theory of the case cannot be grounds for an ineffective assistance of counsel claim, no matter how egregious the conduct of the witness and how predictable the alignment of the witness might be. This was the Tenth Circuit's decision even though alternatives to Bevel's testimony were readily available but never considered by the defense.

The Sixth Circuit, in *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) reached a different result in a similar case. In *Combs*, the defendant contended that he was too intoxicated from alcohol and drugs to form the requisite

intent to kill two women. He did not contest that he fired the shots that killed the women. The defense witness, a clinical psychologist, testified that in his expert opinion the defendant was under the influence of drugs and alcohol at the time of the shootings. However, on cross-examination, the expert explained his belief that the defendant, while intoxicated, was nevertheless acting with intent and purpose. *Id.* at 273. This testimony came as a "surprise" to defense counsel. *Id.* at 288.

The Court there stated that "although Combs's counsel's decision to present Dr. Fisher's testimony might be considered a strategic one, it was a decision made without undertaking a full investigation." *Id.* Applying the *Strickland* standard, the Court held:

> Although defense counsel presented substantial testimonial evidence that Combs was in fact intoxicated at the time of the shootings, this testimony was rendered worthless when the defense's own expert testified that Combs's intoxication did not legally excuse his crime. Furthermore, not only did Fisher's testimony destroy any hope of a successful intoxication defense, but it also helped the prosecution to establish one of the elements of its case in chief. Quite simply, this testimony was completely devastating to the defense, and counsel's decision to present it was objectively unreasonable. *Id.*[2]

This holding is in conflict with the Tenth Circuit's decision in the instant case. Although defense counsel

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[2] The Court reversed the district court's judgment and remanded the case with instructions to issue a writ of habeas corpus unless the state retried the defendant within a reasonable period of time. *Id.* at 292.

presented some testimony critical of the State's blood stain pattern expert, this testimony was rendered worthless when the defense's own expert testified other blood stain patterns indicated most probably Petitioner killed his wife. Not only did Bevel's testimony destroy any hope of a successful forensic defense, it also helped the prosecution establish one of the elements of its case in chief (identity). Quite simply, this testimony was completely devastating to the defense. Under the Sixth Circuit standard this conduct would be considered "objectively unreasonable." These holdings under *Strickland* are in conflict.

The district court in the instant case attempted to distinguish *Combs* on a factual basis, implying that the *Combs* holding was based on defense counsel's failure to question the expert regarding the germane points of his anticipated testimony prior to trial and that in Petitioner's case the expert was fully questioned but intentionally mislead defense counsel about his intended testimony. (App. 45-46). This does not sufficiently distinguish the two cases when one considers that in both cases the net result was the same: defense counsel put a witness on the stand who, upon cross-examination, testified in a way that came as a surprise to counsel and helped the State prove the defendant's guilt. The conflict is particularly evident in light of the Court's salient statement in *Combs* that "regardless of whether Combs's counsel *should have known or instead actually knew* Fisher's opinion regarding Combs's intent . . . counsel's decision to put him on the stand was objectively unreasonable." *Combs*, 205 F.3d at 288 [emphasis provided]. Thus, under the Sixth Circuit standard, it is clear that a successful claim for ineffective assistance of counsel can be based upon the testimony of an expert witness.

Further, the Ninth Circuit, applying the *Strickland* standard, held in *Bean v. Calderon*, 163 F.3d 1073 (9th Cir. 1998), that defense counsel were ineffective at the penalty phase of a capital trial for failure to adequately prepare their expert witnesses for testimony.[3] In *Bean*, defense counsel presented the testimony of two expert witnesses as evidence in mitigation. The Court stated that "the experts' lack of preparation and the limited informational foundation for their conclusions severely undercut their utility to [the Defendant's] penalty-phase defense." 163 F.3d at 1080-1081. The trial court found these deficiencies based upon defense counsel's failure to adequately prepare the experts for testimony. *Id.* at 1080. "[Defense counsel's] presentation of their mental health experts' testimony did not arise from the requisite 'informed judgment,' and constituted ineffective assistance of counsel."[4] *Id.* at 1080. The court there noted that the ineffectiveness at issue resulted from "inadequacies in rudimentary trial preparation and presentation" and noted that these elements of trial preparation "were an integral thread in the fabric of constitutionally effective representation." *Id.* at 1080. This failure of counsel "severely undercut [the expert witnesses'] utility to Bean's penalty-phase defense." *Id.* at 1081.[5] The court concluded that all of these things "undermined confidence in the outcome" under *Strickland*

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[3] The Court reversed and remanded in part, stating that "all of these considerations lead us to agree with the district court and the magistrate judge that [the Defendant] did not receive effective assistance of counsel at the penalty phase of his capital trial. *Id.* at 1080.

[4] Citing *Harris v. Duggar*, 874 F.2d 756, 763 (11th Cir. 1989).

[5] The magistrate judge in that case noted that one of the witnesses' testimony "was less than persuasive at best given this context, and a seeming artifice at worst." 163 F.3d at 1081.

standards, and that "faced with more compelling evidence" by the defense it was "reasonably likely that the jury would have concluded [differently]." *Id.* at 1082.

*Bean* is similar to Dr. Hamilton's case in that the expert witness failed to offer meaningful evidence helpful to the defense. In both cases, it is clear that the testimony of the expert witness rendered the result presumptively unreliable. The Sixth Circuit found this to be grounds for the defendant's claims of ineffective assistance of counsel, and the Tenth Circuit did not.

Further, in another Ninth Circuit case, *Caro v. Calderon*, 165 F.3d 1223 (1999), the Court held that trial counsel's failure to present expert witness testimony during the sentencing phase about the defendant's neurological deficiencies and the causes therefore constituted ineffective assistance of counsel.[6] The Court held that the petitioner was entitled to an evidentiary hearing to present more information about his exposure to neurotoxicants and the effects such exposure had upon his behavior -- which if found to exist, would render the results of the defendant's penalty phase unreliable due to trial counsel's failure to investigate. The Ninth Circuit made this finding even though trial counsel presented some expert witness testimony at trial. The Court noted that "expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone," and that "the type of mitigating evidence omitted here is precisely the type most likely to affect a jury's evaluation of the punishment Caro should receive." 165 F.3d at 1227. The Court also

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[6] The Court remanded the case to the district court for an evidentiary hearing to determine what might have been presented. *Id.* at 1228.

stated "a lawyer whose expert witness advises his client to commit suicide must engage in what the dissent pejoratively labels 'witness shopping.'" *Id.* at 1228. Thus, under the Ninth Circuit standard defense counsel cannot blindly rely upon the first expert consulted.

In *Caro*, deficiencies in presentation of expert witness testimony was found to be a sufficient predicate for the claim for ineffective assistance of counsel. In that case, in order for the defendant to put on evidence in mitigation that would be easily understood by the jury, expert witness testimony was necessary. In Dr. Hamilton's case, expert witness testimony was necessary to counter the state's forensic evidence. In both cases expert witness testimony was an essential element of a successful defense, but in both cases the defense experts failed to challenge the state's case or offer evidence helpful to the accused. This failure was avoidable and the outcome of both trials must be considered presumptively unreliable. Again, but for the content of the testimony of the expert witness, ineffectiveness of trial counsel could not have been found.

Under the standards established in the Ninth Circuit and the Sixth Circuit, a claim for ineffectiveness can be predicated upon the deficient or damaging performance of an expert witness at trial that could have been prevented had trial counsel acted in an objectively reasonable manner.

In the instant case, the Petitioner does not argue that he had a right to effective assistance of an expert witness. Rather, Petitioner contends that defense counsel was ineffective because defense counsel was deceived by the expert witness. The cause of the complete failure of the defense should not be dispositive of the claim. The Ninth and Sixth Circuit standards do not appear to distinguish

between ineffectiveness caused by ignorance or ineffectiveness caused by failure to adequately prepare the experts. The focus instead is upon adversarial testing of the prosecution's case, and the reliability of the determination of guilt or punishment. In Dr. Hamilton's case there was no test of the state's forensic evidence, and the result of the trial is inherently unreliable. Petitioner prays the Court grant certiorari to resolve the conflict among the circuits.

## CONCLUSION

For the reasons set forth herein, the petitioner, Dr. John Baxter Hamilton, respectfully requests that his petition for a writ of certiorari be granted and that this Court review the order denying his Application for Certificate of Appealability entered by the United States Court of Appeals for the Tenth Circuit on February 27, 2007 in Case No. 06-6212. Petitioner prays that this Court reverse the circuit's decision with instructions to grant the Writ of Habeas Corpus.

Respectfully submitted,

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2007 WL 534317

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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JOHN BAXTER HAMILTON,

Petitioner-Appellant,

v.

RANDALL G. WORKMAN, Warden,

Respondent-Appellee.

No. 06-6212
(D.C. No. 04-CV-1392)
(W.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY***

(Filed Feb. 22, 2007)

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Before **TACHA**, Chief Judge, **KELLY** and **O'BRIEN**, Circuit Judges.

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Pursuant to 28 U.S.C. § 2253(c), petitioner-appellant John Baxter Hamilton, an Oklahoma state prisoner appearing with counsel, is seeking a certificate of appealability

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

(COA) to appeal the order entered by the district court denying his petition under 28 U.S.C. § 2254 for a writ of habeas corpus. To obtain a COA, petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this standard, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell,* 537 U.S. 322, 338 (2003) (quotation omitted). We conclude that petitioner has failed to make the showing necessary to obtain a COA. We therefore deny his application for a COA and dismiss this appeal.

In December 2001, petitioner was convicted by a jury in the District Court of Oklahoma County of first degree murder in connection with the death of his wife, Susan Hamilton, and he was sentenced to life in prison without the possibility of parole. Petitioner filed a direct appeal in the Oklahoma Court of Criminal Appeals (OCCA), and the OCCA affirmed his conviction. Petitioner did not seek post-conviction relief in state court.

The evidence that was presented at petitioner's trial is thoroughly summarized in the magistrate judge's lengthy report and recommendation. *See* Aplt. App., Tab 4 at 59-62, 64-66. We will assume a working familiarity with the detailed background facts set forth in the magistrate judge's report and recommendation, and we will not repeat those facts here.

At petitioner's trial, Tom Bevel, a former police officer with the Oklahoma City Police Department and a nationally recognized expert in the areas of bloodstain pattern analysis and crime scene reconstruction, testified as an expert witness on behalf of petitioner. In his testimony,

Mr. Bevel addressed the opinions that had been presented in the prosecution's case-in-chief by its bloodstain expert, Ross Gardner, and he also testified about "a couple of areas" that Mr. Gardner had "missed." *Id.*, Tab 19 at 2455. The magistrate judge summarized the pertinent expert witness testimony in this case as follows:

> The State presented an expert on bloodstain-pattern analysis, attempting to reconstruct the events surrounding Susan Hamilton's death. From the bloodstains on Petitioner's left shoe, Ross Gardner opined that Petitioner was likely present during the spatter event, i.e. when Susan Hamilton was killed. He opined that the stains were not likely the result of an attempt at cardiopulmonary resuscitation. Petitioner's expert on blood spatter evidence offered other possible explanations for the allegedly incriminating blood stains. On cross-examination, however, Petitioner's expert, Tom Bevel, opined that certain of the stains, those on Petitioner's shirt sleeve, were most consistent with Petitioner's involvement in the murder.

*Id.*, Tab 4 at 62 (footnote omitted); *see also id.* at 66 (summarizing Mr. Bevel's trial testimony, and noting that he testified on re-cross "that although other scenarios were possible, in his opinion none of the scenarios proffered were more probable than Petitioner striking his wife").

In his application for a COA,[1] petitioner asserts that "[t]he issues in this case concern a breakdown in the

[1] On September 12, 2006, petitioner filed an application for a COA in this court. Previously, in June 2006, the district court entered an order denying the separate application for a COA that petitioner filed in that court.

adversary process created by the testimony of 'defense' expert Tom Bevel, and his opinion the blood on the inside of John Hamilton's shirt sleeve was most likely the result of John Hamilton striking his wife in the head with a blunt instrument." COA App. at 2. Specifically, as set forth in his supporting brief, petitioner is asserting two claims as part of his application for a COA. First, petitioner argues that he received ineffective assistance from his trial counsel as a result of counsel's decision to have Mr. Bevel testify as an expert witness. According to petitioner, "[d]efense counsel's decision to utilize Bevel in light of his relationship with the State and the devastating opinions he offered at trial was objectively unreasonable." Aplt. Br. at 19. Second, petitioner argues that he received ineffective assistance from his trial counsel due to counsel's failure to put forth exculpatory expert witness testimony to counter the state's forensic case and its bloodstain expert. Petitioner claims that "compelling expert witness testimony was available which would have undermined the State's forensic case," and he argues that his trial counsel's "[f]ailure to discover and present this evidence and blind reliance on Bevel's objectivity denied [him] effective assistance of counsel." *Id.*

Petitioner asserted both of his ineffective assistance claims in the district court proceedings.[2] Applying the

[2] Petitioner also asserted two additional claims below. First, petitioner claimed that he received ineffective assistance from his trial counsel because Mr. Bevel participated in improper communications with members of the prosecution team and/or the Oklahoma City Police Department. Second, petitioner claimed that the OCCA upheld his conviction by fashioning a rule that penalized him for testifying in his own defense. Petitioner has abandoned both of these claims in this appeal, however, *see* COA App. at 3 nn. 1-2, and we therefore do not need to consider them.

standards set forth in 28 U.S.C. § 2254(e)(2), the magistrate judge granted petitioner's request for an evidentiary hearing with respect to his ineffective assistance claims, and a one-day evidentiary hearing was held before the magistrate judge. Among other witnesses, petitioner's trial counsel testified at the hearing. Although Mr. Bevel did not testify at the hearing, his sworn deposition testimony in a related civil case was submitted to the court. Following the hearing, the magistrate judge filed a thirty-three page report and recommendation, recommending to the district court that petitioner's habeas petition be denied. In accordance with the magistrate judge's recommendation, the district court subsequently entered an order denying petitioner's request for habeas relief on both of his ineffective assistance claims. We review the district court's rulings de novo. *See United States v. Orange,* 447 F.3d 792, 796 (10th Cir. 2006) ("A claim for ineffective assistance of counsel presents a mixed question of fact and law, which we review de novo.").

As correctly noted by the magistrate judge, the federal courts have a "'secondary and limited' role in reviewing state court rulings through a petition for a writ of habeas corpus." Aplt. App., Tab 4 at 62 (quoting *Castro v. Ward,* 138 F.3d 810, 815 (10th Cir. 1998)). As the magistrate judge explained:

> For factual and legal issues that have already been adjudicated in state court, the Court may only grant a writ of habeas corpus if that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of evidence

> presented in the State court proceeding. 28 U.S.C. § 2254(d)(1) and (2).
>
> A state court's determination is contrary to clearly established federal law where it applies a rule that contradicts the law set forth in Supreme Court cases, or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court's determination involves an unreasonable application of clearly established Supreme Court precedent if it identifies the correct governing legal principle from the Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413; *see also Wiggins v. Smith*, 539 U.S. 510, 520 (2003). It is not enough that the state court applied clearly established federal law erroneously or incorrectly; the application must also be unreasonable. *Williams*, 529 U.S. at 410-11; *Brown v. Payton*, [544 U.S. 133, 141] (2005) (erroneous or incorrect application of Supreme Court precedent by the state court must be objectively unreasonable).

*Id.* at 62-63.

In its decision in petitioner's direct appeal, the OCCA addressed the merits of both of petitioner's ineffective assistance claims. *See* Aplt. App., Tab 2 at 25, 28-31. The OCCA also identified the correct governing legal principles for analyzing claims for ineffective assistance of counsel under the Sixth Amendment (as applied to the states through the Fourteenth Amendment), as the court applied the principles set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 29. In addition, petitioner is not arguing that the OCCA erred

because it was faced with a set of facts that were materially indistinguishable from a decision of the Supreme Court, but nevertheless arrived at a different result. Accordingly, the only question we must resolve is whether the district court correctly determined that the OCCA did not unreasonably apply the principles set forth in *Strickland.*

"In order to establish a successful claim for ineffective assistance of counsel, [petitioner] must show (1) that counsel's performance was deficient, and (2) that this deficient performance prejudiced his defense, depriving him of a fair trial with a reliable result." *Orange,* 447 F.3d at 796 (citing *Strickland,* 466 U.S. at 687). "Because [petitioner] must demonstrate both *Strickland* prongs to establish his claim, a failure to prove either one is dispositive." *Id.* at 796-97 (citation omitted). Here, the OCCA found that petitioner's trial counsel's performance was not deficient. *See* Aplt. App., Tab 2 at 31 n. 44. Consequently, the OCCA did "not reach *Strickland's* prejudice inquiry." *Id.*

To establish that his trial counsel's performance was deficient, petitioner must show "that counsel's performance fell below an objective standard of reasonableness." *Barkell v. Crouse,* 468 F.3d 684, 689 (10th Cir. 2006) (quotation omitted). In deciding whether this showing has been made, we "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" *Strickland,* 466 U.S. at 690 (emphasis added); *accord Richie v. Mullin,* 417 F.3d 1117, 1120 (10th Cir. 2005) ("[D]ecisions alleged to be deficient must not be viewed in a vacuum; the court must assess such actions from the vantage point of counsel at the time of their making and with all relevant facts in

mind."). Moreover, "[r]eview of counsel's performance under the first prong of the *Strickland* test is highly deferential." *Barkell,* 468 F.3d at 689. As a result,

> [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. To be deficient, the performance must be outside the wide range of professionally competent assistance. Counsel's decisions are presumed to represent sound trial strategy; [f]or counsel's performance to be constitutionally ineffective, it must have been completely unreasonable, not merely wrong.

*Id.* (quotations and citations omitted).

We agree with the district court's conclusion that the OCCA did not unreasonably apply the principles set forth in *Strickland* when it denied relief on petitioner's claims for ineffective assistance of counsel. Thus, with regard to petitioner's claim that he received ineffective assistance from his trial counsel as a result of counsel's decision to have Mr. Bevel testify, we deny petitioner's request for a COA for substantially the same reasons set forth in the magistrate judge's well-reasoned report and recommendation. *See* Aplt. App., Tab 4 at 73-82. Specifically, we agree with the following analysis of the magistrate judge:

> As set forth above, at the time of Petitioner's trial, [his trial] counsel believed that Mr. Bevel would not opine that "the most likely" cause of the blood spatter on Petitioner's sleeve was his involvement in his wife's murder, if that information was "stumbled" on by the prosecution during cross-examination. Counsel believed that Mr. Bevel would opine that the stain was consistent with either Petitioner's involvement or innocent

> interaction, without saying which was more probable. Accordingly, when counsel elected to call Mr. Bevel as a witness they had no knowledge that his testimony would be inconsistent with Petitioner's defense, despite having conducted adequate inquiry. . . . The undersigned cannot conclude that utilizing a witness after asking the pertinent questions, conducting the necessary investigation, and receiving answers consistent with the theory of defense fell below an objective standard of reasonableness. . . . Because counsel's actions were not objectively unreasonable, Petitioner has failed to establish that the application of *Strickland* by the Oklahoma Court of Criminal Appeals was unreasonable. . . .
>
> To the extent the petition can be construed as arguing that any ineffective performance by Mr. Bevel should be imputed to trial counsel, the claim must fail as well. The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. . . . The United States Supreme Court has never recognized a right to the effective assistance of expert witnesses distinct from the right to effective counsel.

*Id.* at 78-80 (footnotes and citations omitted).

With regard to petitioner's claim that he received ineffective assistance from his trial counsel because counsel failed to procure a more favorable bloodstain expert, we likewise deny petitioner's request for a COA for substantially the same reasons set forth in the magistrate judge's report and recommendation. *Id.* at 82-85. In particular, we agree with the following analysis of the magistrate judge and the OCCA:

Petitioner asserts that trial counsel's performance was deficient because counsel failed to retain a different blood spatter expert whose opinions would have contradicted those offered by the State's expert and Mr. Bevel. In support of his request for an evidentiary hearing before the Oklahoma Court of Criminal Appeals, Petitioner included the affidavit of an expert he contends should have been called, John T. Wilson. . . .

In rejecting this claim on direct appeal the Oklahoma Court of Criminal Appeals again applied *Strickland.* Opinion, p. 24, n. 44.

> Finally, in his supplementary materials, Appellant presents the affidavit of another bloodstain expert who concludes that, from his review of the evidence, it is impossible to determine whether or not Appellant was present when his wife was killed. Appellant contends that trial counsel was ineffective for not marshaling this evidence before trial to rebut Gardner's conclusions. The fact that Appellant was able to find a more favorable expert opinion after trial does not mean trial counsel was ineffective for having consulted with a different expert before trial. . . . As noted above, Appellant concedes that counsel's initial choice of Bevel was sound. When counsel undertakes reasonable investigation using qualified experts, we will not gauge his performance by the outcome of the expert's conclusions or testimony. Appellant's trial counsel was not ineffective.

> Opinion, p. 24 (footnotes omitted). Nothing in the Oklahoma Court of Criminal Appeals' decision is contrary to *Strickland* nor was it an unreasonable application thereof.

*Id.* at 83 (citations omitted).

Petitioner's application for a COA is DENIED and this matter is DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

By: Amy Frazer
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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| JOHN BAXTER HAMILTON,<br>Petitioner,<br>vs.<br>RANDALL G. WORKMAN,<br>Warden,<br>Respondent. | ) | NO. CIV-04-1392-T |

ORDER

(Filed Jun. 28, 2006)

Before the court is the petitioner's application for a certificate of appealability [Doc. No. 42] in connection with his appeal of this court's May 17, 2006 order [Doc. No. 40] denying his petition for habeas relief. Pursuant to 28 U.S.C. § 2253(c), he contends that a certificate is warranted.

To obtain a certificate of appealability, petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) and show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 349 (2003), *quoting Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The court concludes that, with respect to the claims he asserts, petitioner has failed to show that reasonable jurists would find the decisions as [sic] issue debatable or wrong. Accordingly, the application for a certificate of appealability [Doc. No. 42] is DENIED.

IT IS SO ORDERED this 28th day of June, 2006.

/s/ Ralph G. Thompson
RALPH G. THOMPSON
UNITED STATES
DISTRICT JUDGE

2006 WL 1444898

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

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| JOHN BAXTER HAMILTON,<br>Petitioner,<br>vs.<br>RANDALL G. WORKMAN, Warden,<br>Respondent. | ) | NO. CIV-04-1392-T |

ORDER

(Filed May 17, 2006)

Petitioner, a state prisoner appearing through counsel, brought this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In accordance with 28 U.S.C. § 636(b)(1)(B), the matter was referred to United States Magistrate Judge Doyle W. Argo for initial proceedings. Following briefing by the parties, the magistrate judge conducted an evidentiary hearing regarding petitioner's claims. Subsequently, the magistrate judge filed a Report and Recommendation [Doc. No. 38] in which he recommended that the petition be denied. Because petitioner has timely objected to the Report and Recommendation, the matter is reviewed *de novo*.

Petitioner was convicted of the first degree murder of his wife following a jury trial in Oklahoma County and was sentenced to life imprisonment without the possibility of parole. On appeal, the Oklahoma Court of Criminal Appeals affirmed his conviction, rejecting the arguments

he asserts in support of his habeas petition. His request for rehearing was also denied.

In this action, petitioner asserts four grounds for habeas relief. Three grounds on [sic] based on the argument that he was denied his right to effective assistance of trial counsel; specifically, he contends that trial counsel was ineffective because: 1) his retained expert, Tom Bevel, had improper communications with the prosecution; 2) counsel decided to have the expert testify at trial; and 3) counsel failed to obtain and present exculpatory evidence in the form of an additional expert who would have rendered opinions more favorable to petitioner. In his fourth ground for habeas relief, petitioner argues that the trial court erred in its instruction regarding circumstantial evidence and that the Court of Criminal Appeals decision concerning the instruction improperly penalized petitioner for testifying at trial.

In the Report and Recommendation, the magistrate judge thoroughly discussed each of these contentions in light of the facts in the record and the applicable law. The court has reviewed same in detail, and has also considered the briefs of the parties, the transcript of the evidentiary hearing before Judge Argo, the record submitted by the parties, and petitioner's objection to the Report and Recommendation.

At the evidentiary hearing on petitioner's claims, the magistrate judge heard the testimony of petitioner's trial counsel, Mack Martin and David Ogle; also called as a witness by petitioner was Oklahoma County District Attorney Wes Lane, who prosecuted the case. Although Tom Bevel did not testify at the hearing, his trial testimony and a deposition transcript were admitted for

consideration by the court, along with an excerpt from an interview with Bevel for a Court TV program. Testifying for the respondent was the trial judge, the Honorable Ray Elliott.

The Report and Recommendation contains a background summary of the trial evidence and the testimony pertinent to petitioner's claims; that summary need not be repeated in this order, but is adopted.[1] *See* Report and Recommendation, pages 2-5.

Pursuant to statute, federal habeas review of a state court decision is limited. 28 U.S.C. § 2254(d)(1) and (2). According to the statute, where factual and legal issues have been adjudicated in state court, this court may only grant a writ of habeas corpus if that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Id.* In this case, the claims raised by petitioner were asserted in his direct appeal and addressed by the Oklahoma Court of Criminal Appeals in its decision affirming his conviction. Thus, the scope of this court's consideration is limited in accordance with the statute.

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[1] *As discussed herein, the court disagrees with petitioner's argument in his objection to the Report and Recommendation that the magistrate judge's summary contains some inaccurate statements.*

I. Ineffective assistance claims:

In his first claim for relief, petitioner argues that his retained expert, Tom Bevel, engaged in improper communications with and became an ally of the prosecution; plaintiff contends that, as a result, he was denied effective assistance of counsel. As discussed in the Report and Recommendation, Bevel was listed as a defense witness and was subpoenaed by the prosecution to testify at trial. On direct examination, he criticized the opinion and report of the prosecution's expert, Ross Gardner. On cross-examination, however, he offered the opinion that certain blood spatters on petitioner's shirt could only have been caused by petitioner striking the victim with an object. *See* Report and Recommendation at pages 8-9 and transcript citations, adopted as though fully set forth herein.

Both the prosecutor and defense counsel described this testimony as devastating to the defense. Petitioner's trial counsel testified at the evidentiary hearing that they did not know Bevel would offer that opinion and that he did not disclose that opinion to them at any time during their trial preparation or at trial. Although Wes Lane testified at the hearing that he did not know that Bevel would offer that opinion at trial, petitioner contends that Bevel improperly disclosed his opinion to either law enforcement witnesses or assistant District Attorneys at some time prior to or during trial. Petitioner contends that Bevel's alleged communications violated the attorney-client privilege and/or work product doctrine and constituted a denial of his right to effective assistance of counsel.

As the magistrate judge noted in the Report and Recommendation, this argument was rejected by the Oklahoma Court of Criminal Appeals in its opinion on

petitioner's direct appeal. As further noted, the record reflects that the appellate court correctly found that there is no evidence that the prosecution in this case obtained privileged or confidential information from Bevel. Bevel's deposition testimony, introduced at the evidentiary hearing, does not contain evidence that he disclosed such information, and no other testimony or evidence in the record before the court supports petitioner's contention that he did so.

In any event, the appellate court found no violation of the attorney-client privilege or work product doctrine. According to the appellate court, the expert's "*discussions* with the accused and counsel may fall under the umbrella of attorney-client privilege, but the expert's own analysis of physical evidence does not." Appellate opinion, p. 20 (emphasis in the original). The appellate court also found no violation of the work product doctrine, as Bevel was an anticipated trial witness whose conclusions, and the factual basis for them, were fully discoverable. *Id.* at p. 21.

The appellate court's opinion was based on state law doctrines regarding the attorney-client privilege and work product doctrine and did not implicate federal law. Furthermore, the privilege is an evidentiary rule which has not been recognized as a constitutional right, and neither the privilege nor the work product doctrine have been recognized as having a constitutional basis. Report and Recommendation at pages 10-11, adopted as though fully set forth herein. Accordingly, the magistrate judge concluded that neither provides a basis for federal habeas relief, as the Court of Criminal Appeals opinion was based on its interpretation of state law and is thus not reviewable by this court. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991); *Hicks v. Feiock,* 485 U.S. 624, 629-30 (1988).

The magistrate judge also rejected petitioner's argument that the appellate court's decision regarding the work product doctrine was an unreasonable application of the law established in *United States v. Nobles,* 422 U.S. 225 (1975) and *United States v. Alvarez,* 519 F.2d 1036 (3rd Cir. 1975). As the magistrate judge explained, *Nobles* establishes that the work product doctrine is not absolute, as recognized by the Court of Criminal Appeals; moreover, *Alvarez* is distinguishable from this case because it involved a non-testifying expert, and Bevel was listed as a testifying expert witness. *See* discussion at pages 12-13 of the Report and Recommendation. As further explained by the magistrate judge, the other decisions on which petitioner relies are not Supreme Court decisions establishing a constitutional right based on the attorney-client privilege or the work product doctrine. The court concludes that the magistrate judge correctly determined that ground one of the habeas petition does not warrant the relief sought by petitioner.

As his second ground for relief, petitioner argues that his trial counsel was ineffective in making the decision to call Bevel as a witness. Petitioner's argument is necessarily premised on his belief that counsel knew Bevel would opine that the blood spatters in question could only have been caused by petitioner's striking the victim. As the magistrate judge concluded, however, the Court of Criminal Appeals was correct in rejecting this argument in accordance with *Strickland v. Washington,* 466 U.S. 668 (1984) because the record establishes that the decision to call Bevel was not objectively unreasonable in light of counsel's knowledge at the time he was called as a witness. Trial counsel Mack Morgan and David Ogle testified at length at the evidentiary hearing regarding this issue,

and their testimony establishes that, contrary to petitioner's belief, they did not know that Bevel would offer the opinion in question and, in fact, they believed that he would testify that the cause of the specific blood spatters at issue could not be determined with certainty.

The undersigned has reviewed the testimony at the evidentiary hearing in detail, and it does not support petitioner's argument. Furthermore, Bevel's deposition testimony does not support the contention. As the appellate court observed, even if Bevel deliberately failed to disclose his true opinion to defense counsel, they cannot be faulted for a "lack of clairvoyance." Appellate opinion, page. 23, n. 39.

The magistrate judge accurately discussed in detail the standards of *Strickland* and petitioner's burden; he further discussed in detail the testimony at the evidentiary hearing and noted that petitioner's current counsel did not call Bevel to testify at that hearing and relied instead on his previous testimony. The court finds the magistrate judge's references to the evidentiary hearing transcript and his detailed discussion of the testimony to be correct and accurate. *See* Report and Recommendation, pages 18-25.

The court agrees with the magistrate judge that petitioner failed to show that his trial counsel was ineffective in making the decision to call Bevel as a witness at trial. The facts in the record and the governing law demonstrate that habeas relief is not warranted on this contention.

In his third ground for relief, petitioner contends that counsel was ineffective in failing to retain an additional expert witness who would offer an opinion more favorable

to petitioner. This issue was also argued to the Court of Criminal Appeals; on appeal, petitioner offered the name of an expert witness who should have been retained by counsel. Rejecting petitioner's argument, the appellate court concluded that, under *Strickland,* counsel could not be constitutionally deficient for failing to locate in advance of the trial the witness found by petitioner after the trial. As the appellate court noted, petitioner agreed with the initial choice of Bevel, and challenged counsel's choice only after Bevel's testimony proved unfavorable. The appellate court concluded that, where counsel undertakes a reasonable investigation using a qualified expert, counsel's performance cannot be gauged by the outcome of the expert's conclusions or testimony. Appellate opinion, page 24. The evidence does not support petitioner's claim that trial counsel failed to exercise reasonable diligence in selecting an expert.

The undersigned agrees with the magistrate judge that the opinion of the Court of Criminal Appeals is not contrary to, or an unreasonable application of, *Strickland.* Thus, petitioner has failed to establish ineffective assistance of counsel based on the third ground asserted. Habeas relief is not warranted on the basis of petitioner's contention.

Circumstantial evidence instruction at trial:

Petitioner's final argument in support of habeas relief is his claim that the trial court erred in refusing to instruct the jury regarding circumstantial evidence and that the appellate court's decision on this issue effectively penalized him for testifying in his own behalf. As the magistrate judge noted in the Report and Recommendation, petitioner

cites several decisions in support of his argument but does not explain their application to his case or articulate how the appellate court decision was contrary to any Supreme Court precedent. As the magistrate judge correctly concluded, petitioner's reliance on *Hicks v. Oklahoma,* 447 U.S. 343 (1980), *Crane v. Kentucky,* 476 U.S. 683 (1986) and *United States v. Jackson,* 390 U.S. 570 (1968) is misplaced. For the reasons explained in detail in the Report and Recommendation, those decisions do not support his claims in this case, as the facts are distinguishable. *See* Report and Recommendation at pages 30-32. The court agrees with the magistrate judge that petitioner has not established entitlement to habeas relief based on ground four.

Petitioner's objection to the Report and Recommendation does not alter the court's conclusion as to any of the asserted grounds for relief. Petitioner reiterates the arguments in his previous briefs. He also criticizes the magistrate judge for including in a summary of the background facts several references to the record which petitioner contends are erroneous; petitioner discusses in some detail what he believes to be the correct summation of the facts. The court does not agree that the magistrate judge was inaccurate in the summary statements made, as the record supports those statements. More important, however, petitioner fails to show how the purported errors impact any of his grounds for relief.

In accordance with the foregoing, the court concludes that the magistrate judge was correct in determining that petitioner has failed to establish a basis for federal relief. Therefore, the Report and Recommendation [Doc. No. 38] is adopted, and the petition is denied.

IT IS SO ORDERED this 17th of May, 2006.

/s/ Ralph G. Thompson
RALPH G. THOMPSON
UNITED STATES
DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

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| **JOHN BAXTER HAMILTON,** | ) | |
| **Petitioner,** | ) | |
| | ) | **Case No. CIV-04-1392-T** |
| **vs.** | ) | |
| **RANDALL G. WORKMAN, Warden,** | ) | **(Filed Nov. 11, 2005)** |
| | ) | |
| **Respondent.** | ) | |

## REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, brings this action pursuant to 28 U.S.G. § 2254, seeking a writ of habeas corpus. Pursuant to an order of United States District Judge Ralph G. Thompson, the matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). A response to the petition has been filed, to which Petitioner has replied. An evidentiary hearing was conducted on October 12, 2005, and thus, the matter is at issue and ready for disposition.

By this action, Petitioner challenges his conviction by a jury for first degree murder, for which he was sentenced to life imprisonment without the possibility of parole, fined $1,000.00 and assessed incarceration fees of $11,104.00. Case No. CF-2001-1147, District Court of Oklahoma County. Petitioner filed a direct appeal, and the Oklahoma Court of Criminal Appeals affirmed on September 2, 2003. Case No. F-2002-35, Oklahoma Court of Criminal Appeals. Petitioner also filed a request for rehearing, which was denied on October 9, 2003. *Id.*

Petitioner raises four grounds in support of his petition for a writ of habeas corpus. In Ground One, Petitioner claims that he was denied the effective assistance of counsel as a result of communications between the State and his expert, Tom Bevel. In Ground Two, Petitioner argues that he was denied the effective assistance of counsel because of counsel's decision to have Mr. Bevel testify. In Ground Three, Petitioner claims that he was denied the effective assistance of counsel due to counsel's failure to obtain and present exculpatory evidence, that is the testimony of an additional expert who would have rendered opinions more favorable to Petitioner. Finally, in Ground Four, Petitioner claims that the trial court erred in its instruction on circumstantial evidence, and that the Oklahoma Court of Criminal Appeals' decision with regard to the instruction penalized Petitioner for testifying in his own defense.

## I. BACKGROUND

Unless otherwise noted, the following facts are taken from the Opinion of the Oklahoma Court of Criminal Appeals in *Hamilton v. State,* F-2002-35 (Okla. Crim. App Sept. 2, 2003) (Opinion).

On February 14, 2001, Susan Hamilton was murdered in the Oklahoma City home she shared with her husband, Dr. John Hamilton, the Petitioner. The Petitioner telephoned 911 at approximately 11:00 a.m. to report that his wife was injured and that he needed assistance. When emergency medical personnel arrived they saw Petitioner sitting near the body, not properly positioned for cardiopulmonary resuscitation, and although Susan Hamilton's

face was bloodied, Petitioner had no blood on his face.[1] Emergency personnel determined Mrs. Hamilton was dead. The State Medical Examiner determined the cause of death was blunt force trauma to the forehead combined with ligature strangulation with Petitioner's neckties. The object used to penetrate Susan Hamilton's skull was never recovered.

The State presented evidence that Petitioner and his wife were having marital problems in the weeks preceding the murder. The State also presented evidence that Susan Hamilton believed Petitioner to be possessive and smothering. The defense presented contradictory testimony.

The State theorized that Petitioner murdered Susan Hamilton between conducting two surgeries on the morning of February 14, 2001. Petitioner conducted a surgery and left the hospital at approximately 8:30 a.m. At 9:00 a.m., Petitioner was paged by a nurse for his next surgery. Petitioner answered the page ten minutes later, explaining that he was away from the hospital and asking that anesthesia be delayed until he had returned.

Petitioner testified at trial that following his first surgery on February 14, 2001, he returned home and exchanged Valentine's Day cards with his wife, who had just finished showering. He testified that he was paged by the hospital for the second surgery and returned to the hospital. Petitioner was seen at the hospital at approximately 9:25 a.m. The victim's mother attempted to reach her daughter by phone at approximately 9:15 a.m., but was unsuccessful.

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[1] Petitioner had blood on his shoes, socks, shirt and hands.

A nurse testified that Petitioner was acting strange during the second surgery on February 14, 2001. The defense presented witnesses to the contrary. The State noted the inconsistencies between the stories Petitioner told other physicians and his office staff. He told a fellow physician that he had run out of time to pick up a gift for his wife between surgeries, but testified at trial that he had been at home giving his wife her Valentine's card between procedures. Petitioner told police that he had intended after the second surgery to go retrieve the flowers he had ordered for Susan Hamilton, but decided he did not have time. Therefore, he chose to go home to retrieve an item described by him at times as an address book, appointment book, and palm pilot.[2]

The Hamilton home revealed no sign of forced or unexpected entry.[3] Inside Petitioner's car the police found traces of Susan Hamilton's blood on the steering wheel, and fragments of her hair and flesh were found on the driver's side threshold. At trial Petitioner testified that after finding Susan Hamilton's body he attempted cardiopulmonary

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[2] Petitioner told officers that he had gone home after the second surgery to retrieve his address book. Petitioner had telephoned his office at approximately 10:30 a.m., at which time he was scheduled to be seeing patients, and informed his staff that he was going to stop home and retrieve his appointment book. During this stop Petitioner discovered his wife's bloody body in their bathroom. When detained on February 14, 2001, Petitioner had his appointment book in his jacket pocket. At trial Petitioner testified that he was actually going home to retrieve his Palm Pilot, which was found in his closet. His appointments had been recorded in his appointment book, not in the Palm Pilot.

[3] Despite considerable testimony regarding the Hamiltons' conscientiousness with regard to the security of their home, Petitioner testified that when he returned to the home after the second surgery the front door was unlocked.

resuscitation. Thereafter he called 911, and decided he needed to move his car into the street so that emergency personnel could access his driveway. His car remained in the driveway because his hands were shaking so badly when he attempted to move the car he could not put the key into the ignition switch. Petitioner aborted his attempt to move the car and went inside to wait for help.[4]

The State presented evidence that Petitioner had several fresh scratches on his upper body consistent with fingernail scratches, theorizing that Susan Hamilton had inflicted the wounds in an effort to thwart the attack by Petitioner. During a break in questioning at the police station a hidden video captured Petitioner examining his shoulders and arms after removing his jail coveralls.

The State presented an expert on bloodstain-pattern analysis, attempting to reconstruct the events surrounding Susan Hamilton's death. From the bloodstains on Petitioner's left shoe, Ross Gardner opined that Petitioner was likely present during the spatter event, i.e. when Susan Hamilton was killed. He opined that the stains were not likely the result of an attempt at cardiopulmonary resuscitation.[5] Petitioner's expert on blood spatter evidence offered other possible explanations for the allegedly

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[4] During his first interview by police Petitioner did not mention his attempt to move his car. Additionally, when police found Susan Hamilton's jewelry hidden in a cabinet in their dressing room Petitioner informed officers that while awaiting help he hid the jewelry to avoid it being stolen.

[5] Petitioner was escorted from the bathroom by emergency personnel, at which time his shoes left a trail of bloody footprints. There were no additional bloody footprints, as would be expected had an intruder fled the scene or Petitioner attempted to move his car as he alleged.

incriminating bloodstains. On cross-examination, however, Petitioner's expert, Tom Bevel, opined that certain of the stains, those on Petitioner's shirt sleeve, were most consistent with Petitioner's involvement in the murder.

## II. STANDARD GOVERNING PETITIONS FOR HABEAS CORPUS

This Court has a "secondary and limited" role in reviewing state court rulings through a petition for a writ of habeas corpus. *See Castro v. Ward,* 138 F.3d 810, 815 (10th Cir. 1998) (citations omitted). For factual and legal issues that have already been adjudicated in state court, the Court may only grant a writ of habeas corpus if that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of evidence presented in the State court proceeding. 28 U.S.C. § 2254(d)(1) and (2).

A state court's determination is contrary to clearly established federal law where it applies a rule that contradicts the law set forth in Supreme Court cases, or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a different result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court's determination involves an unreasonable application of clearly established Supreme Court precedent if it identifies the correct governing legal principle from the Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* at 413; *see also Wiggins v. Smith,* 539

U.S. 510, 520 (2003). It is not enough that the state court applied clearly established federal law erroneously or incorrectly; the application must also be unreasonable. *Williams,* 529 U.S. at 410-11; *Brown v. Payton,* ___ U.S. ___, ___, 125 S.Ct. 1432, 1439 (2005) (erroneous or incorrect application of Supreme Court precedent by the state court must be objectively unreasonable).

## III. DISCUSSION

### A. EVIDENTIARY HEARING

On October 12, 2005, the undersigned conducted an evidentiary hearing on this petition. Petitioner called his trial counsel, Mack Martin and David Ogle, as well as the Oklahoma County District Attorney, Wes Lane, as witnesses in support of his request for habeas corpus relief. Tom Bevel's trial and deposition testimony was accepted by the Court, as well as an excerpt from an interview conducted with Mr. Bevel for the Court TV program Forensic Files, entitled "Deadly Valentine." Petitioner's Hrg. Ex. 4. The Honorable Ray Elliott, the Oklahoma County District Court Judge who presided over Petitioner's state trial, testified for the Respondent. Facts established by the evidentiary hearing will be set forth herein as pertinent to Petitioner's claims, and the transcript will be cited as "Hrg. Tr."

### A. GROUND ONE - INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground One, Petitioner contends he was denied the effective assistance of counsel when a member of his defense team, expert Tom Bevel, engaged in improper communications with and became an ally of the prosecution.

Rejecting this claim on direct appeal, the Oklahoma Court of Criminal Appeals held that because Mr. Bevel was listed as a potential witness by Petitioner, that his opinions were subject to discovery by the prosecution. Opinion, p. 18-21 (included in Relevant State Court Records as Ex. 1).

The defense retained Tom Bevel, an expert in blood-stain-pattern analysis, on February 16, 2001, two days after Susan Hamilton's murder. Trial Tr. Vol. IX, p. 4-5. At the time he was working on Petitioner's behalf, Mr. Bevel was also working with the Oklahoma County district attorney's office on prosecuting other cases. Deposition of Tom Bevel, p. 22-23. Mr. Bevel, a nationally regarded expert in blood-stain pattern analysis, had retired from the Oklahoma City Police Department after twenty-seven years of service. Trial Tr. Vol. XII, p. 80-81.

After being listed as a potential defense witness by Petitioner, Mr. Bevel was subpoenaed by the prosecution; a subpoena defense counsel unsuccessfully attempted to quash. Trial Tr. Vol. IX, p. 3-48. On the final day of trial the prosecutor agreed to withdraw the subpoena if defense counsel did not intend to call Mr. Bevel as a witness. Trial Tr. Vol. XII, p. 78-79. Following the withdrawal of the subpoena, defense counsel called Mr. Bevel to testify. Trial Tr. Vol. XII, p. 79. He was the final witness in the case. Trial Tr. Vol. XII, p. 79-131.

Mr. Bevel critiqued certain findings of the State's expert, Ross Gardner, with whom he has authored books and articles on their shared-area of expertise. Trial Tr. Vol. XII, p 83. Mr. Bevel agreed with Mr. Gardner that Petitioner's jacket, socks, pants, and his right shoe could not be "included" in the attack on Susan Hamilton based on their exposure to blood. Trial Tr. Vol. XII, p. 85-86. Mr.

Bevel disagreed with Mr. Gardner regarding the Petitioner's left shoe. Trial Tr. Vol. XII, p. 90. Mr. Gardner had testified that the blood pattern on Petitioner's left shoe was most consistent with the shoe having been present at the time Susan Hamilton lost the blood, that is, during the attack. Trial Tr. Vol. X, p. 48-49. Mr. Bevel testified that one possible conclusion was that the left shoe could be excluded as being at the scene at the time of the attack. Trial Tr. Vol. XII, p. 97.

Mr. Bevel also testified that Mr. Gardner's conclusions were too detailed based on the evidence available in the Hamilton's home. Trial Tr. Vol. XII, p. 101, 105-06, 120. Specifically, Mr. Bevel believed that the opinions in Mr. Gardner's original report were too specific regarding the transfer of blood from a weapon to Petitioner's shirt. Trial Tr. Vol. XII, p. 110-11. Also on cross-examination Mr. Bevel was asked whether there were any shortcomings in Mr. Gardner's opinions or the police report not already identified. Trial Tr. Vol. XII, p. 122. Mr. Bevel testified that Mr. Gardner had failed to note the existence of blood stains on the door between the bedroom and the bathroom, specifically those on the bedroom side. Trial Tr. Vol. XII, p. 122. He further testified that Mr. Gardner had failed to discuss blood stains present on the inside of Petitioner's shirt sleeve. Trial Tr. Vol. XII, p. 122-24. When questioned specifically about these stains Mr. Bevel opined that the stains were most consistent with Petitioner beating his wife with a blunt instrument. Trial Tr. Vol. XII, p. 125-27. Petitioner's counsel attempted to minimize the impact of the testimony on re-direct by asking whether there were other possible scenarios to explain the presence of the blood in the sleeve, such as striking the blood pool in a fit of rage during a resuscitative effort. Trial Tr. Vol. XII, p.

128. Mr. Bevel testified this was possible. *Id.* On re-cross Mr. Bevel again testified that although other scenarios were possible, in his opinion none of the scenarios proffered were more probable than Petitioner striking his wife. Trial Tr. Vol. XII, p. 130.

Petitioner contends that this cross-examination and the State's ability to accurately and rapidly identify the devastating portions of Mr. Bevel's opinions were the result of interference by the State. Specifically, Petitioner contends that from the time Mr. Bevel was retained by defense attorneys through the time of trial, representatives of the police department and district attorney's office made impermissible attempts to discover whether Mr. Bevel would be called to testify and the substance of any opinions he would offer. Petitioner further contends that Mr. Bevel had improper communications with Mr. Gardner regarding Mr. Gardner's opinions in the case, and that such communications were not authorized by defense counsel.[6]

In considering this claim the Oklahoma Court of Criminal Appeals relied on Okla. Stat. tit. 22 §§ 2002(A)(1)(a) and (B)(1)(a), in concluding that "[a] retained expert's *discussions* with the accused and counsel may fall under the umbrella of attorney-client privilege, but the expert's own analysis of physical evidence does not." Opinion, p. 20 (*citing* Okla.

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[6] Additionally, Mr. Bevel apparently made a recommendation of names to Craig Gravel, a police officer regarding experts the State could utilize, including Mr. Gardner. Deposition of Tom Bevel, p. 46-47 (included in Relevant State Court Records as Ex. A to Ex. 5). There has been no evidence presented, however, of any communications between Mr. Gardner and Mr. Bevel that implicated Petitioner's attorney-client relationship, despite Petitioner's allegations to the contrary.

Stat. tit. 12 § 2502) (emphasis in original). Additionally, the Oklahoma Court of Criminal Appeals concluded that the work product doctrine did not shield Mr. Bevel's opinions from discovery for that same reason, as he was anticipated as a trial witness. *Id.* at 21.

> Because Bevel was an anticipated trial witness, his conclusions, and the factual basis for them, were fully discoverable. We find no impropriety in the State seeking to talk with Bevel before trial about his conclusions. Appellant offers no evidence that Bevel ever divulged privileged information, either before trial or while on the witness stand. Proposition 5 is therefore denied.

*Id.* (footnotes omitted). The Oklahoma Court of Criminal Appeals' decision relied entirely on state law doctrines regarding attorney-client privilege and the work product doctrine, and did not implicate federal law. Accordingly, Petitioner is not entitled to habeas corpus relief on this basis.

The attorney-client privilege is an evidentiary rule that has not been recognized as a constitutional right. *See Clutchette v. Rushen,* 770 F.2d 1469, 1471 (9th Cir.1985) (*citing Maness v. Meyers,* 419 U.S. 449, 466 n. 15 (1975)); *United States v. Rainone,* 32 F.3d 1203, 1206 (7th Cir.1994) "the attorney client privilege . . . hallowed as it is, yet not found in the Constitution"); *Lange v. Young,* 869 F.2d 1008, 1012 n. 2 (7th Cir.1989) ("The attorney-client privilege is a creation of the common law, not the Constitution."). The work product doctrine, codified by statute in Oklahoma, has its roots in the common law. *See* Okla. Stat. tit. 22 § 2002(E)(3) (protecting attorney work product); *In re Grand Jury Proceedings,* 473 F.2d 840, 844 (8th Cir. 1973) ("The background of the work product doctrine

is somewhat obscure. It is clear, however, that the doctrine has arisen from the common law."); Fed. R. Civ. P. 26(b)(3). The Supreme Court has not recognized a constitutional basis for either the attorney-client privilege or the work product doctrine. Because the Oklahoma Court of Criminal Appeals determined that Plaintiff's allegations of improper discovery of information by the prosecution did not violate his attorney-client privilege or the work product doctrine, and because these are not issues of federal law, habeas corpus relief is not available under 28 U.S.C. § 2254. *See Hicks v. Feiock,* 485 U.S. 624, 629-30 (1988) (court is not free to review state court's determination of state law); *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Shipley v. Oklahoma,* 313 F.3d 1249, 1251 (10th Cir. 2002) ("[F]ederal habeas review does not extend to the correction of purely state law procedural errors that do not rise to the level of a constitutional due process violation . . . ") (quoting *Davis v. Kaiser,* No. 00-6080, 2000 WL 895603, *1 (10th Cir. July 6, 2000)); *Lange,* 869 at 1012, n. 2 ("Even if a violation of the attorney-client privilege occurred, this violation alone would be insufficient grounds for [habeas corpus] relief."); *Tames v. Ramirez-Palmer,* No. C 00-4661SI(PR), 2002 WL 1457927, *5 (N.D.Cal. June 28, 2002) ("It has been decided as a matter of state law that Fox's report and testimony were not protected from disclosure by the California attorney work product doctrine. This court will not revisit that determination of state law by the state appellate court.") (footnote and citations omitted).

Additionally, Petitioner's contention that the decision of the Oklahoma Court of Criminal Appeals was an unreasonable application of work product doctrine as set forth by *the* United States Supreme Court in *United States v. Nobles,* 422 U.S. 225 (1975), must fail as well. In *Nobles,* the Supreme Court held that an investigator for a criminal defendant was required to produce his report to the prosecution for use during cross-examination following the investigator's testimony attempting to impeach a key prosecution witness. The Supreme Court considered whether the investigator's reports were protected by the work product doctrine. *Id.* at 236-40. The Court concluded that to the extent any such privilege existed, the defendant waived the right to invoke it by choosing to present the investigator as a witness. *Id.* at 239. The Court rejected the defendant's attempt to argue that ordering disclosure of the investigator's report violated the Sixth Amendment right to the effective assistance of counsel. The Court noted that the work product doctrine, first identified in *Hickman v. Taylor,* 329 U.S. 495 (1947), applied in federal criminal cases, but the privilege is not absolute.

> We cannot accept respondent's contention that the disclosure violated his Sixth Amendment right to effective assistance of counsel. This claim is predicated on the assumption that disclosure of a defense investigator's notes in this and similar cases will compromise counsel's ability to investigate and prepare the defense case thoroughly. Respondent maintains that even, the limited disclosure required in this case will impair the relationship of trust and confidence between client and attorney and will inhibit other members of the 'defense team' from gathering information essential to the effective preparation of

> the case. *See* American Bar Association Project on Standards for Criminal Justice, the Defense Function § 3.1(a) (App. Draft 1971). The short answer is that the disclosure order resulted from respondent's voluntary election to make testimonial use of his investigator's report.

*Id.* at 240, n. 15. The undersigned is unable to conclude that the Oklahoma Court of Criminal Appeals' determination that the work product doctrine was not implicated in the conversations between Mr. Bevel and representatives of the prosecution was contrary to or an unreasonable application of *Nobles.* Certainly *Nobles* establishes that the work product doctrine is not absolute, which the Oklahoma Court of Criminal Appeals recognized in its decision. Moreover, there is no evidence that the State obtained privileged or confidential information from Mr. Bevel.

Petitioner also relies on *United States v. Alvarez,* 519 F.2d 1036 (3d Cir. 1975), in support of this claim. However, in *Alvarez,* the Court was faced with a non-testifying expert whose report was turned over to the prosecution. "If the expert is later used as a witness on behalf of the defendant, obviously the cloak of privilege ends." *Id.* at 1046. Here, however, Petitioner had listed Tom Bevel as an expert he intended to call, and indeed he did call him to testify. Thus, *Alvarez* does not apply.

The remaining cases cited by Petitioner in support of this proposition are either lower federal court decisions or state court decisions. The inquiry under 28 U.S.C. § 2254(d)(1) "begins and ends with the holdings . . . of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Anderson v. Mullin,* 327 F.3d 1148, 1153 (10th Cir.2003) (citations and quotations omitted),

*cert. denied,* 540 U.S. 916 (2003). Therefore, "an absolute prerequisite for petitioner's claim is that the asserted constitutional right on which it rests derive in clear fashion from Supreme Court precedent." *Carter v. Ward,* 347 F.3d 860, 863 (10th Cir. 2003) (*citing Anderson,* 327 F.3d at 1153). Accordingly, Petitioner's reliance on those cases, which are not premised on Supreme Court precedent, is misplaced.

Because Petitioner has not established that the Oklahoma Court of Criminal Appeals' decision on Ground One was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, the undersigned recommends that habeas corpus relief be denied on this claim.

As an aside the undersigned notes that Petitioner did not cite to *Weatherford v. Bursey,* 429 U.S. 545 (1977), wherein the Supreme Court considered whether the alleged interference in the attorney-client relationship by the State has Sixth Amendment implications. *Weatherford* is the seminal "spy in the defense camp" case. In a *Weatherford*-type claim, the focus by the Court is on the intrusion into a defendant's relationship with his attorney. *Shillinger v. Haworth,* 70 F.3d 1132, 1138 (10th Cir. 1996). Unlike a claim alleging a traditional ineffective assistance of counsel claim under *Strickland,* the focus is whether "there was some type of interference in the attorney-client relationship that has constitutional implications under the Sixth Amendment." *Haworth v. Shillinger,* 852 F.Supp. 961, 963 n. 3 (D. Wyo. 1994), *affirmed but remanded,* 70 F.3d 1132 (10th Cir. 1996). The exact parameters of *Weatherford* claims remain ill-defined. In *Cutillo v. Cinelli,* 485 U.S. 1037 (1988), in a dissent on the denial of a petition for a writ of certiorari, Justice White with whom

the Chief Justice and Justice O'Connor joined, noted that since *Weatherford,* courts have been unable to determine "who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of confidential defense strategy information." *Id.* at 1601. Additionally, in *Simmons v. Beard,* 356 F.Supp.2d 548 (W.D.Pa. 2005), the Court noted that "[t]he courts of appeals are still divided on *Weatherford's* reach and whether and how prejudice may be presumed." *Id.* at 569 (citations omitted). However, because Petitioner does not assert that the Oklahoma Court of Criminal Appeals' decision was an unreasonable application of federal law as enunciated in *Weatherford,* and because the Oklahoma Court of Criminal Appeals held that the prosecution did not interfere in the confidential relationship between Petitioner and his counsel and no confidential defense strategy was revealed because the opinions held by Tom Bevel were subject to discovery under Oklahoma law, this issue requires no further consideration. Additionally, the testimony at the evidentiary hearing did nothing to undermine the Oklahoma Court of Criminal Appeals' factual findings regarding information that Petitioner contends was conveyed to the State prior to Mr. Bevel's testimony. At the hearing Mr. Lane denied that he had any prior information about the nature of Mr. Bevel's opinion as to the blood spatter evidence. Tr. 43, 53-54. Mr. Lane testified that he asked the open-ended question upon which Petitioner relies as evidence of collusion because by that point in the trial, he knew that any evidence favorable to Petitioner would have been elicited on direct examination of Mr. Bevel. Hrg. Tr. 41. Mr. Bevel has consistently maintained that he did not convey confidential information to the prosecution. Deposition of Tom Bevel, p. 74, 75, 76, 77, 98 (included in

Relevant State Court Records as Ex. A to Ex. 5). Petitioner has not presented any evidence, much less clear and convincing evidence, to overcome this factual finding by the Oklahoma Court of Criminal Appeals, and accordingly, even if the undersigned considered *Weatherford* and its progeny Petitioner would not be entitled to habeas corpus relief on this claim.[7]

### B. GROUND TWO – INEFFECTIVE ASSISTANCE OF COUNSEL CALLING TOM BEVEL AS AN EXPERT WITNESS

In Ground Two, Petitioner argues that he was denied the effective assistance of counsel when trial counsel made the decision to permit Mr. Bevel to testify despite his clearly devastating opinion regarding certain of the blood stains. In rejecting this claim the Oklahoma Court of Criminal Appeals concluded that under *Strickland v. Washington,* 466 U.S. 668 (1984), Petitioner had not established that trial counsel's decision to call Mr. Bevel as a witness was objectively unreasonable in light of counsel's knowledge regarding Mr. Bevel's opinions.

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[7] Petitioner makes much ado about nothing when he argues that Mr. Bevel implied by his silence that his opinions were unfavorable to Petitioner in conversations with police officers, and prosecutors. Deposition of Tom Bevel, p. 77-78, 83, 86 (included in Relevant State Court Records as Ex. A to Ex. 5). Undoubtedly not answering a question can lead the person who poses the question to infer an answer. However, if Mr. Bevel had answered, regardless of what the answer would have been, the undersigned has no doubt that Petitioner would currently be arguing that the answering of the question was itself sufficient to interfere with the attorney-client relationship. Again, there has been no evidence presented that Mr. Bevel revealed confidential information to any person working on behalf of the State.

"The record shows trial counsel consulted with Bevel extensively before trial, knew the extent of his findings, and consulted with [Petitioner] personally before deciding to put Bevel on the stand." Opinion, p. 22-23. The Oklahoma Court of Criminal Appeals also noted trial counsel's statements in an affidavit that "while he knew Bevel found the stains on [Petitioner's] sleeve 'consistent' with [Petitioner's] direct involvement in his wife's murder, he had no idea Bevel would, on cross-examination, conclude they were 'most consistent' with that explanation. Even assuming that Bevel deliberately downplayed his true opinion to the defense, we cannot fault trial counsel for a lack of clairvoyance." *Id.* at 23, n. 39. These findings by the Oklahoma Court of Criminal Appeals are fully supported by the record and by the testimony at the evidentiary hearing. Both Mr. Martin and Mr. Ogle were adamant in their testimony that had they known that Mr. Bevel would testify that the stains on the shirt were most consistent with Petitioner being the perpetrator, that they would not have listed Mr. Bevel as a witness and they would have sought an alternative expert witness. Hrg. Tr. 66, 92, 94-95. Because the Oklahoma Court of Criminal Appeals analyzed Petitioner's claims under the correct standard as set forth in *Strickland,* Petitioner may prevail on this claim only if he is able to establish that its application of *Strickland* was objectively unreasonable. 28 U.S.C. § 2254(d)(1).

As recently as 2003, the Supreme Court reiterated the legal principles governing claims of ineffective assistance of counsel set forth in *Strickland.*

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104

> S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

*Wiggins,* 539 U.S. at 521 (quoting *Strickland*) (internal citations omitted). To be constitutionally deficient, counsel's performance must have been completely unreasonable, not merely wrong. *Hoxsie v. Kerby,* 108 F.3d 1239, 1246 (10th Cir. 1997). Additionally, Petitioner must overcome the presumption that, under the circumstances, the challenged representation "might be considered sound trial strategy." *Strickland,* 466 U.S. at 689.

To establish prejudice under the *Strickland* standard, a "'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Wiggins,* 539 U.S. at 534 (quoting *Strickland*). There is no reason to address both components of the *Strickland* inquiry if a petitioner makes an insufficient showing on one. *Strickland,* 466 U.S. at 697. Petitioner argues that the Oklahoma Court of Criminal Appeals' decision on his claim of ineffective assistance of trial counsel regarding the decision to call Mr. Bevel as a witness was unreasonable by relying predominately on a

decision of the United States Court of Appeals for the Sixth Circuit, *Combs v. Coyle,* 205 F.3d 269 (6th Cir. 2000). Therein the Court held that Mr. Combs was denied the effective assistance of trial counsel when the expert called to testify on his behalf testified on cross-examination that he believed Mr. Combs although intoxicated, was nevertheless acting with the intent and purpose to kill the victims. Petitioner contends that much like in *Combs,* the decision to call Mr. Bevel by his attorneys was the result of insufficient pretrial investigation and preparation.

The most obvious distinction to be drawn between this case and *Combs,* is that *Combs* did not apply the Antiterrorism and Effective Death Penalty Act (AEDPA) and its provisions requiring deference to state court legal conclusions. *Combs,* 205 F.3d at 277, n. 5. Before the AEDPA a federal habeas court did not afford any deference to the state court's legal decisions resolving the petitioner's federal claims, as such claims were subject to *de novo* review. *See, e.g., Vigil v. Zavaras,* 298 F.3d 935, 940-41 (10th Cir. 2002) (setting forth pre-AEDPA standard of review). Accordingly, the decision by the Sixth Circuit reviewing an issue under *Strickland* under the pre-AEDPA *de novo* standard is of limited utility in this case. *See Brown,* ___ U.S. ___ at 125 S.Ct. at 1439 (under the AEPDA [sic] the erroneous or incorrect application of Supreme Court precedent by the state court must be objectively unreasonable).

The other factor that distinguishes *Combs* is the apparent factual distinction between that case and Petitioner's. In *Combs,* trial counsel attempted to utilize an expert to establish that the petitioner could not act purposely and intentionally because of his diminished capacity. *Id.* at 288. The expert testified that although

intoxicated, given his history of drug and alcohol abuse, petitioner nevertheless acted with intent. *Id.* at 287. Mr. Comb's trial counsel was apparently unaware that the psychiatric expert would testify that although Mr. Combs was intoxicated, he nevertheless acted with intent. *Id.* "[D]efense counsel's failure to have questioned [the expert] in this regard prior to trial is inexcusable." *Id.* at 288. The facts herein are distinguishable. At the evidentiary hearing Mr. Ogle testified as follows:

> Q: (By Mr. Nigh) At any time prior to trial, did Mr. Bevel tell you that he believed that Dr. Hamilton causing Susan Hamilton's death was the most likely cause for the bloodstain inside his sleeve?
>
> A: Absolutely not
>
> Q: Was his information contrary to that?
>
> A: Yes.
>
> Q: In what way?
>
> A: That he felt comfortable in presenting testimony that the type of bloodstain in the right sleeve could be caused by, what I will define as, innocent conduct.
>
> Q: Did he tell you at any time that criminal conduct was more likely?
>
> A: No.

Hrg. Tr. 63-64.[8] Mr. Ogle testified that he had numerous conversations with Mr. Bevel about the evidence. Hrg. Tr.

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[8] Regrettably, when given the opportunity to present testimony from Tom Bevel, clearly a key witness in this case, Petitioner declined,

(Continued on following page)

61, 72. He testified that he and Mr. Martin "had spent a great deal of time preparing and finding out what Mr. Bevel would say, if Mr. Lane stumbled on the question." Hrg. Tr. 83. Mr. Martin testified that Mr. Bevel's opinion, as expressed prior to trial, was that the blood in Petitioner's sleeve could have been the result of resuscitation efforts, interaction with the blood pool, or contact with the victim. Hrg. Tr. 91-92. Mr. Bevel would never specify prior to trial as to the most probable cause of the blood spatter in Dr. Hamilton's sleeve Hrg. Tr. 92. Mr. Martin testified that he had gone over all of the potential scenarios with Mr. Bevel, and felt satisfied that Mr. Bevel's answers would not undermine Petitioner's case. Hrg. Tr. 94. Mr. Martin further testified that Mr. Bevel's trial testimony was in direct contradiction of what Mr. Bevel had told him before trial, and that had he known such testimony would be given, that he would not have utilized Mr. Bevel as a witness. Hrg. Tr. 96-97. Accordingly, unlike *Combs,* where counsel did not make the necessary inquiry of the expert witness, the unchallenged statements of counsel for Petitioner are that they made the necessary inquiries, but that they were misled by Mr. Bevel regarding his intended testimony about "the most likely" cause of the blood stain on Petitioner's sleeve. *Combs* does not dictate the outcome in this case nor does it establish that the Oklahoma Court

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opting to rely on Mr. Bevel's trial testimony, his deposition in a related civil action, and an excerpt from an interview that was part of a television show. Accordingly, the undersigned is left with questions regarding the exact information Mr. Bevel believes he conveyed to Mr. Martin and Mr. Ogle and when Mr. Bevel decided, and why he decided, that the most likely cause of the blood in Petitioner's sleeve was his involvement in Susan Hamilton's murder. Petitioner bears the burden in this action and is represented by counsel whose decisions the undersigned will not question.

of Criminal Appeals' decision was an unreasonable application of *Strickland.*

> In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.*, at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

*Wiggins,* 539 U.S. at 523. In reviewing "an ineffective assistance of counsel claim, [the Court] start[s] by presuming, absent a showing to the contrary, that an attorney's conduct is objectively reasonable because it could be considered part of a legitimate trial strategy." *Bullock v. Carver,* 297 F.3d 1036, 1047 (10th Cir. 2002) (*citing Boyd v. Ward,* 179 F.3d 904, 914 (10th Cir. 1999)).

As set forth above, at the time of Petitioner's trial, counsel believed that Mr. Bevel would not opine that "the most likely" cause of the blood spatter on Petitioner's sleeve was his involvement in his wife's murder, if that information was "stumbled" on by the prosecution during cross-examination. Counsel believed that Mr. Bevel would opine that the stain was consistent with either Petitioner's involvement or innocent interaction, without saying which was more probable.[9] Accordingly, when counsel elected to

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[9] While knowing that Mr. Bevel had concluded that one possible explanation for the blood on the inside of Petitioner's sleeve was that Petitioner had caused Susan Hamilton's death, Mr. Ogle testified that the decision was made to call Mr. Bevel as a witness based upon the

(Continued on following page)

call Mr. Bevel as a witness they had no knowledge that his testimony would be inconsistent with Petitioner's defense, despite having conducted adequate inquiry. Contrary to Petitioner's characterization, Mr. Bevel's testimony was not entirely prejudicial to him. Petitioner challenged Ross Gardner's findings and conclusions in many respects.[10] Additionally, there was uncontroverted testimony by Judge Elliott that Mr. Martin stated immediately before Mr. Bevel testified that Petitioner had decided that he had paid for Mr. Bevel's services and desired to utilize them. Hrg. Tr. 18. Mr. Martin, who was not asked to rebut this statement, also testified that Petitioner, after consultation with counsel, made the decision to call Mr. Bevel as a witness. Hrg. Tr. 93, 103-04. The undersigned cannot conclude that utilizing a witness after asking the pertinent questions, conducting the necessary investigation, and receiving answers consistent with the theory of defense

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"very small likelihood" that the prosecutor would "stumble" upon that evidence. Hrg. Tr. 82-83.

[10] Mr. Bevel testified in his civil deposition that he was asked by Petitioner's counsel to downplay his independent opinions in his expert report, and to instead focus on his critique of Ross Gardner's opinions. Deposition of Tom Bevel, p. 87 (included in Relevant State Court Records as Ex. A to Ex. 5). The absence of independent opinion evidence was noted by Connie Pope, one of the prosecutors, in her civil deposition, leading her to question whether some of Mr. Bevel's opinions might be harmful to Petitioner. Deposition of Connie Pope, p.16-17 (included in Relevant State Court Records as Ex. E to Ex. 5) Additionally, Mr. Lane testified at the evidentiary hearing that in his opinion any unfavorable opinions held by Mr. Bevel would have been elicited on direct examination, alleviating Mr. Lane's concerns that Mr. Bevel's testimony could hurt the prosecution by any open-ended questions he might pose to Mr. Bevel. Hrg. Tr. 41.

fell below an objective standard of reasonableness.[11] *See Sallahdin v. Mullin,* 380 F.3d 1242, 1248 (10th Cir. 2004), *cert. denied,* 125 S. Ct. 2301 (2005) ("To surmount the strong presumption of reasonable professional assistance, a criminal defendant bears the burden of proving, by a preponderance of the evidence, that his trial counsel acted unreasonably."). Because counsel's actions were not objectively unreasonable, Petitioner has failed to establish that the application of *Strickland* by the Oklahoma Court of Criminal Appeals was unreasonable.[12] Accordingly, Petitioner is not entitled to habeas corpus relief on this claim.

To the extent the petition can be construed as arguing that any ineffective performance by Mr. Bevel should be imputed to trial counsel, the claim must fail as well. The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. *Wilson v. Greene,* 155 F.3d 396, 401 (4th Cir. 1998). "To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular ... [expert] was appropriate." *Davie v. Mitchell,* 291 F.Supp.2d 573, 616 (N.D.Ohio. 2003) (citing *Harris v. Vasquez,* 949 F.2d 1497, 1518 (9th Cir.1990); *Silagy v. Peters,* 905 F.2d 986, 1013 (7th Cir.1990)). The United States Supreme Court has never recognized a right to the effective assistance of

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[11] Both Mr. Ogle and Mr. Martin testified that they were not surprised when Mr. Bevel first opined that the stain on Petitioner's sleeve was consistent with guilt. Hrg. Tr. 66, 92.

[12] Additionally, although not specifically raised by Petitioner, the testimony at the evidentiary hearing that Mr. Ogle informed Mr. Bevel of the need for confidentiality and discretion in the exercise of his duties on behalf of Petitioner precludes any argument that counsel was ineffective in failing to properly educate Mr. Bevel about his role within the defense team. Hrg. Tr. 59-60, 87-88.

expert witnesses distinct from the right to effective counsel. *See Waye v. Murray,* 884 F.2d 765, 766-67 (4th Cir.1989) (per curiam); *Poyner v. Murray,* 964 F.2d 1404, 1418-19 (4th Cir.1992); and *Pruett v. Thompson,* 996 F.2d 1560, 1573 n. 12 (4th Cir.1993). Accordingly, in the absence of the ineffective assistance of counsel, Petitioner cannot prevail on this claim.

Petitioner also cites to *United States v. Cronic,* 466 U.S. 648 (1984), in support of Ground Two. *Cronic* is most notable for the pronouncement by the Supreme Court that courts should presume prejudice when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. However, presuming prejudice based on an attorney's failure to test the prosecutor's case requires that an attorney's failure be complete. *Bell v. Cone,* 535 U.S. 685, 696-97 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' "). Petitioner, although citing to *Cronic* and stating that there was no contest between adversaries does not argue that his counsel's failure was complete under *Cronic* so as to give rise to a presumption of prejudice. Moreover, defense counsel conducted vigorous cross-examination of the prosecution's witnesses and made numerous challenges to the evidence presented so as to render *Cronic* inapplicable. *See Turrentine v. Mullin,* 390 F.3d 1181, 1208 (10th Cir. 2004) (*Cronic* presumption is inapplicable where counsel actively participated in all phases of the trial proceedings) (citations omitted), *cert. denied,* ___ U.S. ___, 125 S.Ct. 2544 (2005).

At the evidentiary hearing Petitioner cited to the recent decision of the Tenth Circuit in *Richie v. Mullin,* 417 F.3d 1117 (10th Cir. 2005), in support of his request for habeas corpus relief. In *Richie,* the petitioner alleged that trial counsel was constitutionally ineffective in failing to procure a new expert when the State medical examiner informed counsel just prior to trial that her opinion had changed, and that she now believed the evidence was consistent with the State's theory of guilt. *Richie* instructs that trial counsel's actions cannot be viewed in a vacuum or considered in hindsight. Rather, the inquiry focuses on what counsel knew at the time of the alleged ineffectiveness. As set forth above, both Mr. Martin and Mr. Ogle testified that until Mr. Bevel testified at trial that the stain in the sleeve was most likely caused by Petitioner striking his wife with an instrument, that they had no knowledge that this was his opinion. Their ignorance, however, was not for want of investigation or discussion with Mr. Bevel. The Court should apply *Richie* and the petition should be denied on this claim.[13]

Because Petitioner has failed to establish that the Oklahoma Court of Criminal Appeals' decision on this claim was contrary to or an unreasonable application of

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[13] Petitioner's reliance on *Mitchell v. Gibson,* 262 F.3d 1036 (10th Cir. 2001), is similarly misplaced. In *Mitchell,* the Court held that the State violated the petitioner's right to exculpatory materials pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963). Additionally, the Court concluded that Joyce Gilchrist, on behalf of the State, testified falsely by asserting that tests by the FBI had been inconclusive, when in fact the tests, although inconclusive in some respects, had conclusively eliminated petitioner as the source of that particular evidentiary material. This case does not involve a *Brady* claim or false testimony by a prosecution witness, and *Mitchell* is not applicable to the instant case.

*Strickland,* the undersigned recommends that habeas corpus relief be denied on this claim.

### C. GROUND THREE – FAILURE TO PROCURE A MORE FAVORABLE EXPERT

In Ground Three, Petitioner again asserts that he was denied the effective assistance of counsel, this time by trial counsel's failure to procure a more favorable expert to present "exculpatory" evidence. Petitioner asserts that trial counsel's performance was deficient because counsel failed to retain a different blood spatter expert whose opinions would have contradicted those offered by the State's expert and Mr. Bevel. In support of his request for an evidentiary hearing before the Oklahoma Court of Criminal Appeals, Petitioner included the affidavit of an expert he contends should have been called, John T. Wilson. Affidavit of John T. Wilson (included in Relevant State Court Records as Ex. H to Ex. 5).

In rejecting this claim on direct appeal the Oklahoma Court of Criminal Appeals again applied *Strickland.* Opinion, p. 24, n. 44.

> Finally, in his supplementary materials, Appellant presents the affidavit of another bloodstain expert who concludes that, from his review of the evidence, it is impossible to determine whether or not Appellant was present when his wife was killed. Appellant contends that trial counsel was ineffective for not marshaling this evidence before trial to rebut Gardner's conclusions. The fact that Appellant was able to find a more favorable expert opinion after trial does not mean trial counsel was ineffective for having consulted with a different expert before trial. *Smith v. Cockrell,*

> 311 F.3d 661, 675-76 (5th Cir. 2002); *Williams v. Cain,* 125 F.3d 269, 278 (5th Cir. 1997), *cert. denied,* 525 U.S. 859 . . . (1998). As noted above, Appellant concedes that counsel's initial choice of Bevel was sound. When counsel undertakes reasonable investigation using qualified experts, we will not gauge his performance by the outcome of the expert's conclusions or testimony. Appellant's trial counsel was not ineffective.

Opinion, p. 24 (footnotes omitted). Nothing in the Oklahoma Court of Criminal Appeals' decision is contrary to *Strickland* nor was it an unreasonable application thereof.

A state court's application of federal law is unreasonable when it "correctly identifies the governing legal principle from Supreme Court decisions but unreasonably applies it to the facts of the particular case." *Turrentine v. Mullin,* 390 F.3d at 1189 (quotation and alteration omitted). The United States Court of Appeals for the Eighth Circuit recently set forth a succinct description of a federal court's analysis of the decision of a state court on an ineffective assistance of counsel claim under the AEDPA. The Court's "review under 28 U.S.C. § 2254 of a state court's application of *Strickland* is twice deferential: we apply a highly deferential review to the state court decision; the state court, in turn, is highly deferential to the judgments of trial counsel." *Nooner v. Norris,* 402 F.3d 801, 808 (8th Cir. 2005).

> Decisions based on trial strategy only rise to the level of ineffective assistance of counsel if they are "completely unreasonable, not merely wrong, so that they bear no relationship to a possible defense strategy." *Fox v. Ward,* 200 F.3d 1286, 1296 (10th Cir.2000) (quotation and alteration omitted); *see also Valenzuela v. United States,*

> 261 F.3d 694, 699-700 (7th Cir.2001) (holding that "a lawyer's decision to call or not to call a witness is a strategic decision generally not subject to review" (quotation and alteration omitted)); *United States v. Smith,* 198 F.3d 377, 386 (2d Cir.1999) ("The decision whether to call any witnesses on behalf of the defendant, and if so which witnesses to call, is a tactical decision of the sort engaged in by defense attorneys in almost every trial." (quotation omitted)).

*Jones v. Suthers,* No. 03-1414, 2005 WL 896426, *7 (10th Cir. April 19, 2005), *cert. denied,* ___ S. Ct. ___, 2005 WL 2494084 (Oct. 11, 2005).[14] On direct appeal Petitioner admitted it was not unreasonable for defense counsel to retain Mr. Bevel. The Oklahoma Court of Criminal Appeals' determination that counsel was not ineffective in retaining Mr. Bevel and no additional experts was not unreasonable either.

Counsel is not required to seek out every possible expert in order to find the most favorable testimony available. *See Dowthitt v. Johnson,* 230 F.3d 733, 748 (5th Cir.2000) ("Under the circumstances, trial counsel was not deficient by not canvassing the field to find a more favorable defense expert.").

In this case counsel recognized the need for a bloodstain expert and retained a prominent authority on the subject. "Counsel should be permitted to rely upon the . . . opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule

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[14] This unpublished decision cited as persuasive authority pursuant to Tenth Circuit Rule 36.3.

that his performance was substandard for doing so." *Smith v. Cockrell,* 311 F.3d 661, 676-77 (5th Cir. 2002), abrogated on other grounds by *Tennard v. Dretke,* 542 U.S. 274 (2004). Mr. Bevel offered testimony contrary to that of the States' expert, Ross Gardner, and the undersigned will not second guess counsel's chosen expert based on post-conviction counsel's ability to find an expert willing to offer more complimentary testimony. The Oklahoma Court of Criminal Appeals was not unreasonable to conclude that counsel's investigation and decision to retain and utilize Mr. Bevel and to forego procuring other experts was adequate.[15]

### D. GROUND FOUR – THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION

In Ground Four, Petitioner asserts that the Oklahoma Court of Criminal Appeals' decision related to the circumstantial evidence jury instruction penalized him for testifying on his own behalf. In rejecting this claim in the order denying petition for rehearing, the Oklahoma Court of Criminal Appeals concluded that Petitioner did not meet the requirements of Rule 3.14 of the *Rules of the Oklahoma Court of Criminal Appeals,* governing rehearings because the Court's decision was not in conflict with a controlling decision. Specifically the Court concluded that *Hooks v. State,* 19 P.3d 294 (Okla. Crim. App. 2001), upon which Petitioner relied, had not overruled *Mayes v. State,*

[15] The undersigned is well familiar with Mr. Martin and Mr. Ogle and they are two of the best criminal defense attorneys in the Oklahoma City area. Their representation of Petitioner in the trial of this matter was excellent. They vigorously examined and cross-examined witnesses and marshaled evidence in support of their theory of the case.

887 P.2d 1288 (Okla. Crim. App. 1994), and therefore, the Court's reliance on *Mayes* was not inappropriate. Petitioner contends this ruling on an issue of state law infringed on his right to testify on his own behalf.

In support of Ground Four, Petitioner relies on *Hicks v. Oklahoma,* 447 U.S. 343 (1980), *Crane v. Kentucky,* 476 U.S. 683 (1986) and *United States v. Jackson,* 390 U.S. 570 (1968). Petitioner does not, however, explain how these cases are applicable in his case or how the Oklahoma Court of Criminal Appeals' decision in his case was contrary to any applicable Supreme Court precedent. Petitioner's contention is that the Oklahoma Court of Criminal Appeals violated Oklahoma law in its ruling on his petition for rehearing. However, the Oklahoma Court of Criminal Appeals is the arbiter of state law, and this Court must pay deference to its findings in that regard. Furthermore, and simply stated, the cases cited by Petitioner are not applicable to his case.

In *Hicks,* the Supreme Court concluded that an Oklahoma defendant had a liberty interest in having his sentencing conducted by a jury following the invalidation of the habitual offender sentencing scheme that had been applied in his case. The jury had been instructed that forty years was the mandatory sentence under the habitual offender statute. 447 U.S. at 344-45. Following invalidation of the statute, forty years became the maximum sentence, but it was no longer mandatory. *Id.* at 345. On direct appeal the Oklahoma Court of Criminal Appeals noted that the invalidity of the habitual offender sentencing scheme, but found that Hicks was not prejudiced by the forty-year sentence because it was within the statutory range of punishment. *Id.*

The Supreme Court held that the Oklahoma Court of Criminal Appeals' decision deprived Mr. Hicks of due process because Oklahoma law gave a defendant a right to sentencing by a jury. The State could not arbitrarily deprive a defendant of that right by guessing that a jury would have sentenced him to forty years, even if not mandatory. *Id.* at 345-346. "Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.* at 346. "If the state violated its own laws, [a petitioner] must show that the alleged violation of state law denied him due process under the Fifth and Fourteenth Amendments." *Aycox v. Lytle,* 196 F.3d 1174, 1179 (10th Cir.1999) (citing *Hicks,* 447 U.S. at 346). In order to benefit from the rule in *Hicks,* a habeas petitioner must show that the alleged failure to apply state law was "arbitrary in the constitutional sense." *Aycox,* 196 F.3d at 1180 (quotation omitted). Petitioner has not met this standard.

The Oklahoma Court of Criminal Appeals held on direct appeal that Petitioner's testimony was direct evidence of the crime, and accordingly, he was not entitled to a circumstantial evidence instruction. "Once the defendant presents direct evidence on the controverted issue, the evidence is no longer 'entirely circumstantial,' and a cautionary instruction on circumstantial evidence is not required." Opinion, p. 11. The Court of Criminal Appeals concluded that the instruction, although not "a model of clarity," did not lessen the State's burden of establishing the elements of first degree murder beyond a reasonable doubt. Opinion, p. 12.

As noted above, the Oklahoma Court of Criminal Appeals' decision that Petitioner was not entitled to a circumstantial evidence instruction was based on its

decision in *Mayes*, 887 P.2d at 1301-03. In his request for rehearing Petitioner asserted that *Mayes* was no longer good law, citing to *Hooks v. State,* 19 P.3d 294 (Okla. Crim. App. 2001), wherein the Oklahoma Court of Criminal Appeals stated that "a defendant's testimony does not provide direct evidence unless he includes actual direct evidence of the crime." 19 P.3d at 305, n. 7. The Oklahoma Court of Criminal Appeals rejected the request for rehearing, concluding that *Hooks* did not overrule *Mayes.* Order Denying Petition for Rehearing, p. 1 (included in Relevant State Court Records as Ex. 7). Absent an error of constitutional magnitude, this Court is bound by the Oklahoma Court of Criminal Appeals' interpretation of Oklahoma state law. *See Clemons v. Mississippi,* 494 U.S. 738, 747 (1990). Accordingly, the theory that a State's violation of its own laws necessarily implicates due process is not applicable where the State, consistent with its own precedent, has concluded there was no underlying violation of state law.

Petitioner's reliance on *Crane v. Kentucky,* 476 U.S. 683 (1986), and *United States v. Jackson,* 390 U.S. 570 (1968), do not assist his cause. In *Crane,* the Supreme Court held that a criminal defendant is entitled to introduce evidence regarding the environment in which he confessed to a crime to support his defense that his confession was not credible. "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. . . . That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690-91 (citations omitted). Petitioner does not identify any evidence that he was

precluded from presenting in support of his defense so as to render *Crane* applicable to his case.

*Jackson* arose out of a federal criminal prosecution under the Federal Kidnaping Act, which the Supreme Court interpreted as permitting a sentence of death only after a jury trial, while precluding such sentence in the event a defendant abandoned his right to a trial by jury. *Id.* at 570-71. The Supreme Court determined that such a provision had a chilling effect on a defendant's right not to plead guilty under the Fifth Amendment and the right to demand a jury trial under the Sixth Amendment. *Id.* at 581. The Oklahoma Court of Criminal Appeals' decision in Petitioner's case is not impacted by *Jackson*. Petitioner was permitted to present his theory of defense, and the State had the right to have all of the evidence, including Petitioner's testimony, considered by the jury. *Jackson* does nothing to support Petitioner's habeas corpus claim. Petitioner has not established that he is entitled to habeas corpus relief on Ground Four.

## RECOMMENDATION

For these reasons, the undersigned recommends that the petition for a writ of habeas corpus be denied. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by November 30, 2005, in accordance with 28 U.S.G. § 636 and Local Civil Rule 72.1. Petitioner is further advised that failure to timely object to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Moore v. United States*, 950 F. 2d 656 (10th Cir. 1991). This Report and Recommendation

disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

**ENTERED this 10th day of November, 2005.**

/s/ Doyle W. Argo
DOYLE W. ARGO
UNITED STATES
MAGISTRATE JUDGE

**IN THE COURT OF CRIMINAL APPEALS**
**OF THE STATE OF OKLAHOMA**

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| JOHN BAXTER HAMILTON, Appellant, v. THE STATE OF OKLAHOMA, Appellee. | ) | **NOT FOR PUBLICATION** Case No. F-2002-35 |

**OPINION**

(Filed Sep. 2, 2003)

**JOHNSON, PRESIDING JUDGE:**

Appellant, John Baxter Hamilton, was charged by Information in Oklahoma County District Court, Case No. CF-2001-1147, with First-Degree Murder (21 O.S.Supp.1998, § 701.7(A)). Jury trial was held December 3 through 19, 2001, before the Honorable Ray C. Elliott, District Judge. The jury found Appellant guilty as charged and recommended a sentence of life imprisonment without parole. The trial court sentenced Appellant in accordance with the jury's recommendation on January 8, 2002.[1] Appellant timely perfected this appeal.

Appellant was found guilty of murdering his wife, Susan Hamilton. Around 11:00 a.m. on February 14, 2001, Appellant called 911 and reported finding his wife's nude, bloodied body on the floor of their master bathroom. Emergency personnel responded to the Hamilton home, but Mrs. Hamilton was pronounced dead at the scene. The

[1] The trial court also imposed a $1000 fine and assessed incarceration fees at $11,104.

State Medical Examiner later determined that the cause of death was blunt force trauma to the forehead combined with ligature strangulation. The strangulation was accomplished with two of Appellant's neckties; the injury to the victim's forehead, penetrating the skull, was caused by an inanimate object which was never recovered or identified.

Appellant is an Oklahoma City obstetrician and gynecologist. He operated a women's clinic, and his wife was also his business partner. It was undisputed that the Hamiltons had been having some marital difficulties in the weeks preceding the murder. The State presented witnesses who characterized Appellant's attitude toward his wife as possessive and smothering; the defense elicited testimony contradicting this assessment.

The State theorized that Appellant killed Mrs. Hamilton in a fit of anger after coming home between two surgeries he had scheduled for the morning of February 14. Appellant attended the first surgery and then left the hospital, around 8:30 a.m. Around 9:00 a.m., a hospital nurse paged Appellant to tell him they were ready for the second surgery. Appellant did not answer the page for over ten minutes. When he did answer the page, Appellant explained that he was away from the hospital and asked that the preparations be delayed until he could get back.

At trial, Appellant testified that after the first surgery, he drove home and exchanged Valentine's Day cards with his wife, who had just got out of the shower, before receiving the page about returning for the second surgery. A neighborhood security guard testified that he observed Appellant's car at home somewhere between 8:30 and 9:00 a.m. Appellant arrived at the hospital for the second

surgery sometime before 9:25 a.m. Mrs. Hamilton failed to attend a meeting she had scheduled for 9:30 a.m. that morning. Mrs. Hamilton's mother testified that she tried to call her daughter twice around 9:15 a.m., but got no answer.

The State presented witnesses who felt Appellant was acting unusual during the second surgery; the defense presented witnesses who noticed nothing unusual about Appellant's demeanor. The State pointed out that Appellant gave differing explanations for his whereabouts before the second surgery,[2] and differing explanations for why he drove home after the second surgery instead of attending to scheduled appointments at his clinic.[3]

An examination of the crime scene revealed no sign of forced or unexpected entry into the home.[4] Inside Appellant's car, police found traces of the victim's blood on the

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[2] A fellow surgeon testified that Appellant claimed to have run out of time trying to get a Valentine's Day gift for his wife. The evidence showed that Appellant had previously placed an order with a local florist, but did not pick up the order that morning.

[3] Appellant called his office around 10:30 a.m. and said he was going home to pick up his appointment book. When interviewed by police, Appellant said he had gone home to pick up his address book. Appellant's appointment book was found in his pocket, and his address book was found inside his briefcase which was in the trunk of his car. At trial, Appellant testified that he had gone home to get his "day planner" or "Palm Pilot." A personal data assistant (PDA or "Palm Pilot") was found in Appellant's closet. However, Appellant's appointments for February 2001 were entered in the appointment book he had on his person, and were not on the PDA.

[4] By all accounts, the Hamiltons were meticulous about home security. Appellant claimed the front door was unlocked when he came home to find his wife's body. Police noted that a back door to the home was partially open when they arrived; however, the damp dirt and grass outside the door exhibited no footprints, and no grass or mud was seen inside the doorway.

steering wheel, and her hair and flesh were found on the driver's side threshold. At trial, Appellant explained that after finding his wife's body, attempting CPR, and then calling 911, he decided to move his car from the driveway so that emergency personnel would not have to park in the street. However, Appellant's car was in the driveway when help arrived. Appellant testified that he was unable to start the car because his hands were shaking such that he could not put the key into the ignition switch, and that he gave up and went back inside to wait for help.[5]

The State presented evidence that Appellant had several fresh scratches on his upper body which were consistent with fingernail scratches, theorizing that Mrs. Hamilton inflicted these wounds as she tried to repel Appellant's attack. The State also presented evidence that during a break in questioning at the police station, after detectives left the interview room, Appellant calmly unfastened the top of his jail coveralls and examined his shoulders and arms. A hidden-camera video of this event was shown to the jury.[6]

The State also presented expert testimony on blood-stain-pattern analysis in an attempt to reconstruct the sequence of events surrounding Mrs. Hamilton's death.

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[5] When first interviewed by police, Appellant neglected to mention his attempt to move his car. In addition, police subsequently found Mrs. Hamilton's jewelry holder secreted in a cabinet of the Hamiltons' dressing room, adjacent to the bathroom where Mrs. Hamilton died. Appellant testified that while waiting for help to arrive, he hid the jewelry holder and its contents in the cabinet, because he was afraid someone might steal something valuable.

[6] Several police officers, firefighters, and paramedics testified that Appellant's state of distress at the crime scene, and immediately thereafter, appeared less than sincere.

From the attributes of certain bloodstains on Appellant's shoes, the State's expert concluded that in all probability, Appellant was present during the "spatter event," i.e. when the blood-producing injuries were inflicted, and that the stains were probably not the result of his merely stepping in the victim's blood upon finding her body or while attempting CPR.[7] Appellant presented his own expert in bloodstain-pattern analysis. Appellant's expert offered other possible explanations for certain bloodstains that the State's expert found incriminating. However, on cross-examination, Appellant's expert conceded that the most "consistent" explanation for small bloodstains on Appellant's shirt cuff was Appellant's involvement in his wife's murder.

Additional facts will be presented below as relevant to the propositions of error raised.

In Proposition 1, Appellant claims he was denied a fair trial when various witnesses, as well as the prosecutors, were allowed to offer personal opinions of his guilt.[8]

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[7] The bathroom floor was covered in blood, and Appellant left bloody footprints as he was escorted out of the room by emergency personnel. However, there were no such bloody footprints leading out of the room before this time, as might have been expected if either (1) a murderous intruder had quickly fled or (2) Appellant had quickly run outside to move his car before help arrived. An attending firefighter, who saw Appellant crouched over the victim, did not believe Appellant was in the correct position to be performing CPR as he claimed. The victim's face was bloodied as well, and while Appellant had bloodstains on his shoes, socks, shirt, and hands, he had no blood on or near his face as might have been expected from attempting CPR. Expert testimony also noted a "pattern transfer" on Appellant's shirt, consistent with some bloodstained, inanimate, man-made object being pressed against it.

[8] The prosecutors' comments are discussed in connection with Proposition 4.

Some of these comments were objected to by defense counsel, and some were not. We review the unchallenged comments for plain error only. *Simpson v. State,* 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693.

Jan Beauchamp, a former employee of Appellant's, was asked by the prosecutor why she called police when she heard that Mrs. Hamilton had been murdered. Beauchamp said she called police because she "just knew it was John" who committed the crime. Defense counsel did not object to the prosecutor's question, but did request an admonishment after the answer, which the trial court gave. While we agree that Beauchamp's answer was not probative of any fact in issue,[9] we cannot say this one comment affected the outcome of the trial, particularly in light of the trial court's admonishment.[10] *Price v. State,* 1976 OK CR 22, ¶ 10, 546 P.2d 632, 636.

Susan Johnston, one of the Hamiltons' neighbors, was permitted over defense objection to testify that when she saw police outside the home, she asked an officer if it was

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[9] Beauchamp, who had briefly been employed at the clinic several years before the murder, was called by the State to testify about her observations of the Hamiltons' relationship. Beauchamp's opinion of Appellant's guilt simply lacked any evidentiary basis. The record suggests that Beauchamp's answer may have come as a surprise to the prosecutor as well as the defense.

[10] The trial court's admonishment reminded the jury that it was up to them "to determine who committed this crime." Appellant contends that this admonishment wrongly charged the jury with identifying the murderer, rather than merely deciding if Appellant was in fact the murderer. However, by not requesting any clarification, trial counsel waived all but plain error regarding this issue. *Eslinger v. State,* 1987 OK CR 53, ¶ 13, 734 P.2d 830, 833. We find the instructions given at the end of the trial sufficiently outlined the jury's true responsibilities. *Humphreys v. State,* 1997 OK CR 59, ¶ 5, 947 P.2d 565, 570.

a murder-suicide – implying that she feared Appellant had committed the crime and then killed himself. However, it was clear from Johnston's testimony that her fear did not amount to fact-based suspicion, and was more likely engendered by simple curiosity. Johnston could not recall exactly what she had said to the police. While Johnston testified that she was aware the Hamiltons had been having some marital problems of late, she also believed they had a close and happy relationship. Johnston's spontaneous comment to police may not have been relevant, but its context was clear to the jury. We fail to see how it could have influenced the jury's decision. *Jackson v. State,* 1998 OK CR 39, ¶ 51, 964 P.2d 875, 890, *cert. denied,* 526 U.S. 1008, 119 S.Ct. 1150, 143 L.Ed.2d 217 (1999).

Late in the trial, the assistant prosecutor asked a police detective if, having now heard the evidence at trial, she felt her initial decision to arrest Appellant for the crime was in error.[11] The evidence necessary to arrest someone falls far short of the evidence required for conviction; the gist of the question was thus not whether the detective thought Appellant was guilty, but whether she still felt she had probable cause to effect his arrest. Defense counsel did not object to this question, and we find no plain error requiring reversal. *Simpson,* 1994 OK CR 40, ¶ 12, 876 P.2d 690, 695.

Appellant complains that several law enforcement officers were permitted to testify on matters without any particular qualification thereon. Initially, we note that the Evidence Code generally permits any witness to testify

[11] Not surprisingly, the detective answered in the negative.

about matters of personal knowledge, so long as the testimony is helpful to the trier of fact. 12 O.S.2001, § 2701. The "personal knowledge" of the witness may include facts of the case at hand, the witness's past experiences, and opinions based on applying the latter to the former. While witnesses generally should not give opinions on matters which the jury is equally competent to determine themselves, *see Wacoche v. State,* 1982 OK CR 55, ¶ 22, 644 P.2d 568, 573, this does not mean that every matter outside the jury's collective personal experience requires "expert" evaluation.[12]

Appellant complains that Detective Burke was permitted to testify, over objection, that Appellant's emotional response immediately after his wife's murder was more consistent with that of a perpetrator than a person who had unexpectedly lost a loved one. A review of the record, however, shows that Detective Burke's testimony was much more equivocal. Burke expressed his past observations in generalities, and the trial court specifically limited his testimony on this point, barring him from giving an opinion about Appellant in particular. We find Detective

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[12] "[O]pinions or conclusions of ordinary witnesses derived from common experience and observation of things which persons generally are capable of comprehending and understanding are admissible when the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time. Whether this testimony be classed as a statement of fact or an opinion, it [is] admissible." *Carroll v. State,* 54 Okl.Cr. 196, 199, 16 P.2d 891, 892. *See also Trice v. State,* 1993 OK CR 19, 853 P.2d 203, 213-14 (officer's lay testimony concerning his experience in shoe print comparisons was admissible), *cert. denied,* 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 597 (1993); *Lee v. State,* 1983 OK CR 41, ¶ 35, 661 P.2d 1345, 1354 (police officer, like any other lay witness, could testify that certain stains appeared to be blood).

Burke's testimony was rationally based on his years of personal experience in interviewing crime suspects, witnesses, and victims, and was therefore not improper.[13]

Similarly, Detective Spruill testified (over defense objection) that from his experience as a crime scene investigator, the level of violence at a crime scene often corresponded to the closeness of the relationship between the perpetrator and the victim. The trial court barred Spruill from offering any direct opinion about the perpetrator's state of mind based on the crime scene in this particular case. We find Detective Spruill's testimony to be rationally based on his personal experience as a crime scene investigator.[14]

Appellant also complains that Detective Spruill was permitted to offer a theory on how the perpetrator might have got out of the house without leaving a trail of blood on the carpet. Because this line of inquiry was invited by defense counsel on cross-examination, Appellant would not normally be entitled to any relief thereon. *Mooney v. State*, 1999 OK CR 34, ¶ 39, 990 P.2d 875, 887. Detective

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[13] *Burrows v. State*, 1982 OK CR 6, ¶ 18, 640 P.2d 533, 539 (testimony of lay witnesses which, rather than relating to defendant's state of mind, merely described his behavior and reaction, was not inadmissible as bearing upon ultimate issues in homicide prosecution), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 480 (1983); *Hickerson v. State*, 1977 OK CR 197, ¶ 11, 565 P.2d 684, 686 (no error in officer's testimony, based on his experience in taking crime reports, that robbery victims do not typically remember every detail of the assailant's physical description).

[14] *See Welch v. State*, 2000 OK CR 8, ¶¶ 21-23, 2 P.3d 356, 368-69, *cert. denied*, 531 U.S. 1056, 121 S.Ct. 665, 148 L.Ed.2d 567 (2000) (detective's testimony that murder victim's injuries were intentionally inflicted by another and were not accidental was proper, as it was based on detective's specialized training and examination of the crime scene).

Spruill's testimony on this point was based on his experience in crime-scene investigation, applied to his observations of the crime scene in this case. It was therefore proper.[15]

Appellant complains of improper opinion testimony from Ross Gardner, an expert in the field of bloodstain pattern analysis called on behalf of the State. Gardner testified that from his observation of the crime scene, and the bloodstain patterns on Appellant's shoes, he believed Appellant was "present during the spatter event" (i.e. the murder). Gardner also attempted a "reconstruction" of the missing murder weapon, based on the dimensions and other attributes of the victim's head wound and a blood pattern transfer on Appellant's shirt. This endeavor, Appellant asserts, was based on subjective evaluations of the physical evidence. Appellant also complains that the prosecutor repeatedly elicited Gardner's opinion that any reasonable theory o1 how Mrs. Hamilton was killed which would have pointed to Appellant's innocence, had been defeated.[16]

Because defense counsel did not object to Gardner's opinions, we review only for plain error. Simpson, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 693. We find Gardner's opinion that Appellant was "present" during the murder was proper, even if it came close to the ultimate issue in the

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[15] *See Welch*, 2000 OK CR 8 at ¶ 18, 2 P.3d at 368 (detective's opinion that perpetrator had confined victim's dogs to garage prior to murder in order to gain entry to the house, was properly admitted as a lay opinion, based on the detective's investigation).

[16] For the "hypothetical" scenarios presented to Gardner, the prosecutor borrowed from defense counsel's opening statement.

case.[17] 12 O.S.2001, § 2704. We note that defense counsel thoroughly cross-examined Gardner, and called two well-credentialed experts of his own to critique Gardner's conclusions about the sequence of events and the possible murder weapon. *See Harris v. State,* 2000 OK CR 20, ¶¶ 27-28, 13 P.3d 489, 496-497, *cert. denied,* 532 U.S. 1025, 121 S.Ct. 1971, 149 L.Ed.2d 764 (2001). As for Gardner's opinion that any reasonable theory of Appellant's innocence had been defeated: Gardner's own conclusions were clearly at odds with parts of Appellant's statement to police (and, as it turned out, his testimony at trial). It was therefore proper for Gardner to state that he found Appellant's explanations untenable, and to explain *why* he did so. The jury was free to reject any witness's observations and opinions. OUJI-CR (2nd) No. 9-42. In conclusion, we have examined each opinion complained of, and cannot say that Appellant's trial was rendered fundamentally unfair by them. 20 O.S.2001, § 3001.1. Proposition 1 is therefore denied.

In Proposition 2, Appellant alleges error when the trial court, over defense objection, gave the jury a modified version of a Uniform Jury Instruction on circumstantial evidence. Appellant preserved this issue for review by objecting to the modification during the instruction conference. *Gilson v. State,* 2000 OK CR 14, ¶ 122, 8 P.3d 883, 918. The Uniform Instruction reads:

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[17] *See Romano v. State,* 1995 OK CR 74, ¶ 25, 909 P.2d 92, 110, *cert. denied,* 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996) ("It is one thing to say a defendant is in close proximity to a violent attack and quite another to state definitely a defendant participated in the attack").

> The State relies [in part] for a conviction upon circumstantial evidence. In order to warrant conviction of a crime upon circumstantial evidence, each fact necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All the facts necessary to such proof must be consistent with each other and with the conclusion of guilt the State seeks to establish. All of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion of a defendant's innocence. All of the facts and circumstances, taken together, must establish to your satisfaction the guilt of the defendant beyond a reasonable doubt.

OUJI-CR (2nd) No. 9-5. After including the optional bracketed "in part" language, the trial court modified the instruction by inserting the word "alone" in the second sentence, thus:

> The State relies *in part* for a conviction upon circumstantial evidence. In order to warrant conviction of a crime upon circumstantial evidence *alone,* each fact necessary to prove the guilt of the defendant must be established by the evidence beyond a reasonable doubt. All the facts necessary to such proof must be consistent with each other and with the conclusion of guilt the State seeks to establish. All of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion of a defendant's innocence. All of the facts and circumstances, taken together, must establish to your satisfaction the guilt of the defendant beyond a reasonable doubt.

(Emphasis added.)

The gist of Appellant's argument is that (1) the State's case against him, at least on the crucial issue of identity of the perpetrator, was "entirely circumstantial," (2) the modified instruction erroneously led the jury to believe that the State's case was comprised of both direct and circumstantial evidence, and therefore (3) the jury must have rejected the latter part of the instruction, which required it to consider whether all of the facts and circumstances, taken together, were "inconsistent with any reasonable theory or conclusion of [Appellant's] innocence."

This Court has often held that when the evidence against the accused is entirely circumstantial in nature, the evidence should exclude every reasonable theory of the defendant's innocence. *See e.g. Riley v. State,* 1988 OK CR 144, ¶ 6, 760 P.2d 198, 199. However, the law makes no distinction between direct and circumstantial evidence; either, or any combination of the two, may be sufficient to support a conviction. *Clark v. State,* 1983 OK CR 79, ¶ 8, 664 P.2d 1065, 1066; OUJI-CR (2nd) No. 9-4. Indeed, we long ago observed that circumstantial evidence has the ability to surpass direct evidence in terms of probative force. *Ex parte Jefferies,* 1912 OK CR 215, 7 Okl.Cr. 544, 548, 124 P. 924, 925-26.

Whether the evidence against the accused is direct, circumstantial, or any combination of the two, there is but one standard by which each element of the offense must be proven to obtain a conviction, and that is by proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *Flores v. State,* 1995 OK CR 9, ¶ 15, 896 P.2d 558, 563, *cert. denied,* 516 U.S. 1002, 116 S.Ct. 548, 133 L.Ed.2d 450 (1995); *D.R.R. v. State,* 1987 OK CR 40, ¶ 3, 734 P.2d 310, 311. Once the

defendant presents direct evidence on the controverted issue, the evidence is no longer "entirely circumstantial," and a cautionary instruction on circumstantial evidence is not required. *Mayes v. State,* 1994 OK CR 44, ¶¶ 37-42, 887 P.2d 1288, 1301-03, *cert. denied,* 513 U.S. 1194, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995).[18] Appellant testified, offering direct evidence that he was not the murderer. Because the evidence was not entirely circumstantial, no cautionary instruction on circumstantial evidence was warranted.

The importance of clear, appropriate, and legally accurate jury instructions cannot be overemphasized. The purpose of the instructions is to direct the jury's consideration of the evidence into proper legal channels, so that it may reach a legally sound verdict. *Kamees v. State,* 1991 OK CR 91, ¶ 7, 815 P.2d 1204, 1207. The Oklahoma Uniform Jury Instructions were created in an attempt to minimize the danger of instruction error. 12 O.S.2001, § 577.1. We admonish trial courts to use the Uniform Instructions whenever appropriate, as required by 12 O.S.2001, § 577.2, and to refrain from case-by-case modifications to those instructions without a clear and sound legal basis for the change expressed in the record. *See Brown v. State,* 1989 OK CR 33, ¶¶ 4-8, 777 P.2d 1355, 1357-58. While the modified instruction at issue here was

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[18] *Accord Phillips v. State,* 1982 01C CR 29, ¶ 6, 641 P.2d 556, 559; *Davis v. State,* 1981 OK CR 114, ¶ 11, 634 P.2d 752, 755; *Moran v. State,* 1976 OK CR 256, ¶ 13, 555 P.2d 1085, 1087-88. *See also Clayton v. State,* 1984 OK CR 88, ¶ 6, 695 P.2d 3, 5-6 (once the accused presents evidence in his own defense, sufficiency of the evidence to support conviction is determined by an examination of the entire record, not just the State's evidence).

not a model of clarity,[19] it in no way lessened the State's burden of establishing each element of the offense by proof beyond a reasonable doubt.[20] *Johnson v. State,* 1996 OK CR 36, ¶ 40, 928 P.2d 309, 318, *cert. denied,* 522 U.S. 832, 118 S.Ct. 99, 139 L.Ed.2d 54 (1997). Proposition 2 is therefore denied.

In Proposition 3(A), Appellant claims he was denied his constitutional right to present a defense when the trial court excluded certain proffered evidence. The evidence at issue was offered in support of the defense theory that as the wife of a physician who performed abortions, Mrs. Hamilton could have been murdered by an anti-abortion activist. The proffered evidence consisted of (1) testimony that Appellant's clinic, and the Hamilton home, had been picketed by anti-abortion protesters in the past, and that an anti-abortion group had obtained a permit to demonstrate in front of the Hamilton home in February 2001; (2) an undated "Wanted" flyer, purportedly distributed by an

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[19] By using contradictory terms ("in part" and "alone"), the instruction appeared to leave it to the jury to determine whether or not the evidence was entirely circumstantial, and served as an invitation for the parties to argue the point in their closing statements. The defense argued that the evidence was entirely circumstantial, and the State argued that it was not. Appellant contends the prosecutor mischaracterized certain evidence as "direct" evidence. Because we find the evidence was not entirely circumstantial for other reasons, we find no prejudice in the prosecutor's statements.

[20] Because reliance on circumstantial evidence, in whole or in part, does not in any way alter the State's burden of proof, we reject Appellant's contention that the trial court's modification was a "structural error" which can never be harmless. Even assuming the evidence against Appellant could be considered entirely circumstantial, we do not find it so inherently weak or improbable as to warrant relief. *Pearson v. State,* 1981 OK CR 83, ¶ 5, 632 P.2d 765, 767; *Grimmett v. State,* 1977 OK CR 320, ¶ 6, 572 P.2d 272, 274.

anti-abortion group called the "Army of God," accusing Dr. Hamilton of murdering unborn children; (3) testimony that Mrs. Hamilton received anonymous "hang-up" telephone calls a few days before her death; and (4) testimony that an unidentified person or persons had been seen in the Hamiltons' neighborhood on the day of the murder.

Evidence tending to show that someone besides the defendant committed the crime may clearly be relevant, as it may make it less probable that the defendant himself committed the crime. 12 O.S.2001, § 2401. On the issue of "alternative suspect" evidence, we have held:

> [E]vidence offered to show that some other person committed the crime charged must connect such other person with the fact; that is some overt act on the part of another towards the commission of the crime itself. There must be evidence of acts or circumstances that tend clearly to point to another, rather than the accused. . . . [It is] not enough to show a possible motive on the part of another; the evidence must show an overt act by the third person toward the commission of a crime.

*Woodruff v. State,* 1993 OK CR 7, ¶ 47, 846 P.2d 1124, 1137, *cert. denied,* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993).

Here, the evidence proffered by the defense not only failed to establish an overt act by a third party, but more fundamentally, it failed to establish an identifiable third party.[21] There was no evidence of any direct threat, by any

[21] Appellant's reliance on *Garner v.* State, 711 P.2d 1191, 1194-95 (Alaska 1986) is unpersuasive. In *Garner,* a prosecution for child abuse murder, the defendant was one of only two people who watched the

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person or group, known or unknown, toward Appellant's wife, or toward Appellant himself for that matter.[22] Because the proffered evidence was ambiguous and speculative, the trial court did not abuse its discretion in excluding it.[23] 12 O.S.2001, § 2401; *Romano v. State,* 1993

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child on the day he was beaten to death. The second person, a neighbor, was a witness at trial. The court reversed the conviction because, although the defendant was allowed to cross-examine the babysitting neighbor about her prior acts of abuse toward her own child, he was barred from presenting extrinsic evidence on the issue. Unlike the situation here, the "alternative suspect" in *Garner* was an identified person who actually had the child in her care shortly before the homicide.

[22] To support his argument, Appellant refers generally to the militant activities of some anti-abortion activists around the nation in recent years, aimed at physicians who perform abortions and the clinics where they work. However, Appellant offers no reason to conclude that such activists have murdered, or would consider murdering, the spouse of a physician who performs abortions, particularly by breaking into a home and beating and strangling the spouse in her own bathroom. The very fact that an anti-abortion group had made itself known to the police – by following the law and obtaining a permit to picket Appellant's clinic and residence – casts doubt on the suggestion that its members would resort to such violent tactics. The anonymous telephone calls and unidentified person in the neighborhood are simply too ambiguous to have any probative value. There was no way to tell if the telephone calls were directed at Mrs. Hamilton in particular, merely random, or simply a case of wrong number; there was no evidence of any kind of threat made by the caller. We also disagree with Appellant's assertion that the State took advantage of the court's ruling by arguing that, to accept the defense theory, "someone just happened to luck into finding the back door unlocked." This was a fair comment. Appellant offers no reason to assume that an anti-abortion activist would have any less difficulty gaining entry into the home than a garden-variety home invader would.

[23] *See People v. Stern,* 226 A.D.2d 238, 240-41, 641 N.Y.S.2d 248, 251-52 (N.Y.A.D. 1996) (murder defendant was not deprived of his right to present a defense, where his proffered evidence of alternative suspects, including an anonymous telephone call to the victim and the fact that drug dealers were allegedly "after" the victim, did not

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OK CR 8, ¶ 45, 847 P.2d 368, 381, *aff'd.*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). We also note that Appellant ably presented a general "home invader" theory using the physical evidence at the crime scene.

In Proposition 3(B), Appellant claims he was denied the right to meaningful cross-examination of two witnesses, Shary Coffey and Alliena Aguirre. The trial court restricted Appellant's cross-examination of Coffey regarding whether Mrs. Hamilton had mentioned receiving anonymous telephone calls a few days before her death. We have already found this evidence too speculative to establish a possible alternative suspect, and find no other ground for admission.[24] As for witness Aguirre, the evidence showed

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establish any clear connection to another possible suspect); *People v. Medina*, 208 A.D.2d 974, 975, 617 N.Y.S.2d 230, 232 (1994) (inmate charged with murdering fellow inmate was not entitled to introduce letters showing that other inmates had a "beef" to settle with someone, absent proof of who wrote letters, when they were written, or to whom they referred); *People v. Enis*, 139 Ill.2d 264, 282, 564 N.E.2d 1155, 1161-62, 151 Ill. Dec. 493, 499-500 (1990) (in murder prosecution, evidence that victim had received an anonymous card containing handwritten message, "May all your dreams come true," was too ambiguous and speculative to suggest victim was being stalked or harassed by a third-party suspect).

[24] Appellant claims that the anonymous telephone calls Mrs. Hamilton received shortly before her death were relevant to show her "state of mind" preceding her murder. Appellant appears to argue that Mrs. Hamilton was distressed over the telephone calls, not over her marriage. Yet the fact that the Hamiltons were having marital problems immediately preceding the murder was never in dispute. The uncontroverted evidence was that both Appellant and his wife considered the problems serious, but were making efforts to resolve the situation. The State never alleged that Mrs. Hamilton expressed any fear of her husband in the days preceding her death; the State's theory was essentially that Appellant committed the murder in a sudden rage. In other words, whether Mrs. Hamilton was concerned

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that Appellant made numerous calls from his cell phone to Aguirre's pager in the weeks before the murder. Aguirre testified that she had formerly been a patient of Appellant's, and that she had recently come to him in a very depressed state and obtained anti-depressant prescriptions from him. Appellant claims he was prevented from having Aguirre explain that the reason he tried to call her so many times was simply to check on her emotional well-being. This, Appellant contends, would have countered the State's suggestion that he was really calling Aguirre because he wanted a more personal relationship with her. But the record shows that Aguirre flatly denied any affair with Appellant, and had no personal knowledge of his true motives for calling her. On cross-examination, Aguirre conceded that Appellant had called many times to check on her emotional state, and had even referred her to a local hospital for her depression. We find no improper restriction of Appellant's cross-examination on this issue. Proposition 3 is denied.

In Proposition 4, Appellant lists six types of prosecutorial misconduct which, taken as a whole, denied him a fair trial. Complaints made for the first time on appeal are reviewed only for plain error. *Skelly v. State,* 1994 OK CR 55, ¶ 28, 880 P.2d 401, 407. Those met with a timely objection are reviewed against the totality of the evidence presented to determine if the trial was fundamentally fair. *Romano v. State,* 1995 OK CR 74, ¶ 57, 909 P.2d 92, 116, *cert. denied,* 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

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about anonymous phone calls was not shown to be particularly relevant to any fact in issue. 12 O.S.2001, §§ 2401, 2803(3).

First, Appellant charges that the prosecution intentionally misled the defense about State's theory of the case. According to Appellant, the State implied before trial that it would present evidence that Appellant was a chronic domestic abuser, but at trial, it presented no such evidence. Appellant complains that his defense was compromised by having to spend time and effort preparing for witnesses who were never called, and that the jury was left to speculate about evidence that the State, in *voir dire,* proposed but never delivered.

In our view, Appellant is complaining about the success of his own efforts. One of the State's preliminary hearing witnesses claimed that Mrs. Hamilton confided to her that Appellant was physically abusive; the witness also claimed to have seen bruises on Mrs. Hamilton consistent with such abuse. In preparation for trial, the defense marshaled evidence adversely bearing on this witness's credibility, and the State announced, after two days of jury selection, that it would not call the witness at trial after all.[25] The result was exactly what Appellant sought. Defense counsel told the trial court he was still prepared for trial, but requested additional time to reformulate his opening statements, which the court granted. We find no evidence of unfair surprise or prejudice in the State's tactical decision.[26] *Cannon v. State,* 1998 OK CR 28,

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[25] The State also elected not to call at least two other proposed witnesses on the issue of domestic abuse.

[26] Appellant's reliance on *Patterson v. State,* 2002 OK CR 48, ¶¶ 23-25, 45 P.3d 925, 931, is misplaced. In *Patterson,* the prosecutor proposed, in closing argument, an entirely new theory of how the defendant might have committed the crime – a theory which was at odds with the State's own evidence. Here, the State withdrew bad-character

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¶ 23, 961 P.2d 838, 847; *Knighton v. State,* 1996 OK CR 2, ¶ 65, 912 P.2d 878, 894, *cert. denied,* 519 U.S. 841, 117 S.Ct. 120, 136 L.Ed.2d 71 (1996).

Appellant also argues that the prosecutors gave personal opinions of Appellant's guilt, commented on facts not in evidence, evoked sympathy for the victim, and disparaged the defense. Only one of the comments was met with a contemporaneous objection, which was sustained, thus curing any error. *Wilkey v. State,* 1998 OK CR 11, ¶ 5, 953 P.2d 347, 349. The other comments were not improper.[27] Appellant's trial was not rendered unfair by

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evidence prior to trial; its theory as to how it believed Appellant committed the crime remained unchanged.

[27] One gratuitous and improper comment, of the "When did you stop beating your wife?" variety, was objected to, and the objection was sustained ("So it's fair to say, Mrs. Brainard, that you do not know what the object was that John Hamilton took out of the house and destroyed after he bludgeoned his wife – "). However, similar questions were proper. For example, defense counsel asked a surgeon if, during Appellant's second surgery on the day of the murder, Appellant had been acting like someone who had just committed murder. When the surgeon testified that he noticed nothing usual, the prosecutor asked, "Well, just how many people who have just murdered somebody have you operated with, sir?" This question was proper in the context of defense counsel's question. Closing-argument claims that Appellant was the killer were not improper; the prosecutors did not suggest that these assertions were based on anything but the evidence presented. *See Moore v. Gibson,* 195 F.3d 1152, 1173-74 (10th Cir.1999), *cert. denied,* 530 U.S. 1208, 120 S.Ct. 2206, 147 L.Ed.2d 239 (2000); *compare Omalza v. State,* 1995 OK CR 80, ¶ 92, 911 P.2d 286, 309 (assertions which appear to be based on evidence not presented to the jury are improper). Comments suggesting that Appellant panicked after the crime were fair inferences based on evidence at the murder scene, and Appellant's demeanor as related by some witnesses. *Moore,* 195 F.3d at 1172. Comments on Appellant's demeanor as a witness were also permissible. *Smith v. State,* 1986 OK CR 158, ¶ 33, 727 P.2d 1366, 1373-74, *cert. denied,* 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 780 (1987). The State's closing arguments did not improperly appeal to victim sympathy

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the prosecutors' conduct. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Powell v. State,* 2000 OK CR 5, ¶ 152, 995 P.2d 510, 539, *cert. denied,* 531 U.S. 935, 121 S.Ct. 321, 148 L.Ed.2d 258 (2000).

In Proposition 5, Appellant complains that communications between agents of the State and a bloodstain-pattern expert hired by the defense compromised his right to a fair trial. In Proposition 6, Appellant alleges that his trial counsel rendered ineffective assistance by (1) calling this expert to testify, because the expert offered testimony damaging to the defense in cross-examination; (2) not challenging the reliability of bloodstain-pattern analysis and the validity of the State's expert's conclusions; and (3) not presenting expert testimony on the subject which was more favorable to the defense. Because all of these issues are related, we address them together.[28]

Two days after his wife's murder, Appellant hired Tom Bevel, a nationally-recognized expert in bloodstain-pattern

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merely because they referred to the victim by name. The prosecutor's claim that the evidence against Appellant was not "exclusively circumstantial" was a fair comment, and not a misstatement of the law; see the discussion regarding Proposition 2. We find no prejudice, particularly in light of trial counsel's failure to object. *Johnson v. State,* 1986 OK CR 187, ¶ 16, 731 P.2d 424, 428. Lastly, the prosecutors' analogies and characterizations of the defense strategy were within the bounds of fair argument; we note that defense counsel made offered similar analogies and comments in his closing as well.

[28] In support of these claims, Appellant has submitted a motion to supplement the record and requested an evidentiary hearing, pursuant to Rule 3.11(B)(3)(b), *Rules of the Court of Criminal Appeals,* 22 O.S.2001, Ch. 18, App. Appellant's motion to supplement the appeal record is GRANTED. For reasons discussed below, his request for an evidentiary hearing is DENIED.

analysis, to assist in his defense. Bevel had testified about crime scene investigations numerous times in his 27-year career as an Oklahoma City police detective. After retiring from the police force, Bevel continued as an independent expert in bloodstain patterns. He had consulted in crime-scene investigations in several states, and co-authored a manual on the subject with Ross Gardner, whom the State eventually hired as its bloodstain expert in this case.[29] At the time he was retained by Appellant, Bevel was also known to be consulting with the Oklahoma County prosecutors on several other cases.

During discovery, the defense listed Bevel as an anticipated trial witness and provided the State with his written report. Defense counsel called Bevel as his last witness. On direct examination, Bevel critiqued the conclusions of the State's expert, Ross Gardner, finding somewhat more ambiguity in some of the physical evidence than Gardner did. On cross-examination, however, the prosecutor asked Bevel if there was anything else he found noteworthy in his investigation which had not been discussed. Bevel noted small bloodstains on Appellant's shirt sleeve, and characterized them as "consistent" with Appellant beating his wife with a blunt instrument. When pressed by the prosecutor, Bevel conceded that while "anything is possible," this was the "most consistent" explanation from the scenarios presented to him.

Appellant alleges that throughout the pendency of the prosecution, State agents (including detectives, assistant

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[29] See Bevel & Gardner, *Bloodstain Pattern Analysis: With an Introduction to Crime Scene Reconstruction*, CRC Press (2nd ed. 2001). According to the record, this book was selected as the standard reference on the subject by the International Association for Identification.

prosecutors, and the State's own bloodstain expert) improperly communicated with Bevel about his opinions after examining the crime scene.[30] Appellant claims that these communications violated the attorney-client privilege and/or the work-product privilege, thereby compromising his defense strategy and denying him effective assistance of counsel and a fair trial.

The purpose of a criminal trial is to ascertain the truth.[31] To this end, Oklahoma's Criminal Discovery Code requires each party to divulge certain information to the other, including sufficient information about its anticipated witnesses to permit the adverse party an opportunity to interview them in preparation for trial.[32] 22 O.S.2001, § 2002(A)(1)(a), (B)(1)(a). Counsel for both parties have a right and a duty to thoroughly investigate the case, which includes speaking with potential witnesses. Of course, potential witnesses have no duty to talk with opposing counsel.

Appellant's argument presumes that there is an absolute privilege preventing an expert retained by the

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[30] The inquiries were apparently informal and general, such as, "What was your analysis? What did you find?"

[31] "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970) (holding that the Fifth Amendment does not bar discovery rule requiring defendant to give pretrial notice of alibi and information on witnesses supporting that defense).

[32] Our Criminal Discovery Code requires pretrial disclosure of witnesses a party "intends to call" at trial. Obviously, a party must decide before trial whether they *might* call a particular witness, and err on the side of disclosure to avoid sanctions for offering a witness without pretrial notice. *See* 22 O.S.2001, § 2002(E)(2).

defense, and anticipated to be a trial witness, from personally communicating with agents of the prosecution. We disagree. The fact that Bevel was retained by the defense to perform professional services does not, by itself, transform all of his opinions and conclusions into privileged material. A retained expert's *discussions* with the accused and counsel may fall under the umbrella of attorney-client privilege, but the expert's own analysis of physical evidence does not.[33] *See* 12 O.S.2001, § 2502. And while the "work-product" doctrine may insulate certain documents from discovery, it does not prevent a party from speaking with a witness that his opponent anticipates calling at trial.[34] Because Bevel was an anticipated trial witness, his conclusions, and the factual basis for them, were fully discoverable.[35] We find no impropriety in the State seeking

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[33] *Cf.* 22 O.S.2001, § 2002(B)(3)(b) (disclosure of scientific reports of anticipated defense witnesses is limited to non-privileged information). Appellant's reliance on *Van White v. State*, 1999 OK CR 10, ¶¶ 56-62, 990 P.2d 253, 269-271, is misplaced. In that case, we held that the attorney-client privilege extended to a psychiatrist's interview with the defendant, and his findings based on the interview. The psychiatrist's information was privileged, not simply because he was retained by the defense (in fact, he was appointed by the court), but because it was gleaned from conversations with the defendant himself.

[34] The work-product doctrine, applicable to both civil and criminal matters, is broader than the attorney-client privilege. It shelters the mental processes of counsel in preparation for litigation, as reflected in notes, memoranda, or other documents. *See* 22 O.S.2001, § 2002(E)(3). The privilege may extend to the work of investigators and other agents that counsel employs for assistance; but once a party elects to present such agent as a witness, the work-product privilege is waived with respect to matters covered in the agent's testimony. *See United States v. Nobles*, 422 U.S. 225, 236-240, 95 S.Ct. 2160, 2169-2171, 45 L.Ed.2d 141 (1975).

[35] Once an expert has been named as an anticipated trial witness, his conclusions do not revert to privileged work-product merely because they contain opinions arguably unfavorable to the party that hired him.

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to talk with Bevel before trial about his conclusions.[36] Appellant offers no evidence that Bevel ever divulged privileged information, either before trial or while on the witness stand.[37] Proposition 5 is therefore denied.

We also reject Appellant's claim that his trial counsel was ineffective for calling Bevel to testify. Appellant claims that because Bevel's testimony proved to be not as favorable to him as he would have liked, there was no true adversarial testing of the State's forensic case. To establish that he was denied his Sixth Amendment right to effective assistance of counsel, Appellant must first show that his trial counsel's performance was deficient under prevailing professional norms. If he is able to establish deficient performance, Appellant must then demonstrate that he was prejudiced by that performance. *Strickland v. Washington,*

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Just as the accused may not testify without being subjected to cross-examination, he may not present a witness without complying with relevant reciprocal discovery rules. "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *United States v. Nobles,* 422 U.S. at 241, 95 S.Ct. at 2171.

[36] Appellant also alleges impropriety in that Bevel communicated with the State's retained expert, Ross Gardner, several times before trial. We find no impropriety in the mere fact that expert witnesses from opposing sides consult with each other. Part of Bevel's task was to critique Gardner's analysis, which could naturally require Bevel to contact Gardner and discuss his findings. Any suggestion that Bevel "coached" Gardner, or that Gardner obtained "inside information" from Bevel, is belied by the differences in their testimony.

[37] *Cf. Walker v. State,* 1994 OK CR 66, ¶ 23, 887 P.2d 301, 309-310 (defendant's general claim that pretrial disclosure of defense psychiatrist's report violated evidentiary privilege would be denied, where record contained no evidence of exactly what privileged information might have been divulged), *cert. denied,* 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995).

466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In considering any claim of ineffective counsel, courts must be very careful to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065.

To be an effective advocate, counsel should make reasonable inquiry into all potentially viable avenues of defense. Discharging this obligation, however, is not entirely without risk, as counsel cannot control the evidence that may be developed.[38] Appellant's trial counsel quickly realized the importance of bloodstain analysis in this case, and promptly secured one of the most respected experts on the subject. Counsel had no control, however, over the expert's ultimate findings. *Strickland* cautions that counsel's *informed* choice among different options should be afforded a great deal of deference; "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland, id.* at 690, 104 S.Ct. at 2066. The record shows trial counsel consulted with Bevel extensively before trial, knew the extent of his findings, and consulted with Appellant personally before deciding to put Bevel on the stand.[39] Appellant concedes that, giver. Bevel's

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[38] *Cf. Lockett v. State,* 2002 OK CR 30, ¶ 25, 53 P.3d 418, 426 (by exploring possibility of an insanity defense, defendant subjected himself to evaluation by State's psychologist, and his uncounseled statements to that expert were admissible in penalty phase of capital murder trial, even though he abandoned insanity defense before trial), *cert. denied,* ___ U.S. ___, 123 S.Ct. 1794, 155 L.Ed.2d 673 (2003).

[39] The deposition testimony and affidavits in Appellant's supplemental record show that Bevel told defense counsel about the unfavorable

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credentials, counsel's initial decision to hire him was reasonable, and completely defense-favorable testimony from such a respected expert would have been "compelling." Counsel's informed, strategic decision to call Bevel at trial was also reasonable under the circumstances.[40]

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findings; that they were not included in Bevel's written report provided to the State; and that even as Bevel was about to testify, the lead prosecutor still had no clear sense of whether any of Bevel's findings would be favorable to the State. In an affidavit, trial counsel states that while he knew Bevel found the stains on Appellant's sleeve "consistent" with Appellant's direct involvement in his wife's murder, he had no idea Bevel would, on cross-examination, conclude they were "most consistent" with that explanation. Even assuming that Bevel deliberately downplayed his true opinion to the defense, we cannot fault trial counsel for a lack of clairvoyance. *Roberts v. State*, 1996 OK CR 7, 910 P.2d 1071, 1081. On cross-examination, the prosecutor merely gave Bevel the opportunity to provide any additional information he felt was important arising from his investigation. Bevel was, of course, obligated by his oath to answer the question truthfully.

[40] We find the situation here distinguishable from two cases cited by Appellant, *Smith v. State*, 1982 OK CR 143, 650 P.2d 904, and *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000), *cert. denied sub nom. Bagley v. Combs*, 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000). In *Smith*, we found trial counsel ineffective for failing to explore a potential line of defense – specifically, for failing to interview one of two psychiatrists who had interviewed the defendant. Here, trial counsel *did* explore potential lines of defense by promptly hiring his own expert to review the forensic evidence and to review the conclusions of the State's expert. Indeed, *Smith* reinforces our holding that counsel has a duty to inquire of expert witnesses his opponent may call at trial. Counsel in *Smith* had decided not to interview the expert in part because the State had subpoenaed her, and counsel therefore assumed that the expert would have nothing helpful to offer the defense. *Smith*, 1982 OK CR 143 at ¶¶13-22, 650 P.2d at 906-08. As it turned out, the expert in *Smith* did have information helpful to a party other than the one that anticipated calling her. In *Combs*, the Sixth Circuit found trial counsel ineffective for not learning prior to trial that his expert witness had reached conclusions damaging to the defense, which were elicited by the prosecutor in cross-examination. Again, unlike the situation at bar, trial counsel's fault in *Combs* was inadequate trial preparation, not

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Appellant's remaining allegations of ineffective assistance are likewise without merit. Counsel was not ineffective for failing to challenge the fundamental reliability of bloodstain-pattern analysis as presented by the State's expert; counsel reasonably chose instead to vigorously cross-examine Gardner about his specific conclusions. *Hogan v. State,* 1994 OK CR 41, ¶ 21, 877 P.2d 1157, 1161 (bloodstain-pattern analysis is admissible), *cert. denied,* 513 U.S. 1174, 115 S.Ct. 1154, 130 L.Ed.2d 1111 (1995).[41] Finally, in his supplementary materials, Appellant presents the affidavit of another bloodstain expert who concludes that, from his review of the evidence, it is impossible to determine whether or not Appellant was present when his wife was killed.[42] Appellant contends that trial counsel was ineffective for not marshaling this evidence before trial to rebut Gardner's conclusions. The fact that Appellant was able to find a more favorable expert opinion after trial does not mean trial counsel was ineffective for having consulted with a different expert before trial. *Smith v. Cockrell,* 311 F.3d 661, 675-76 (5th Cir. 2002); *Williams v. Cain,* 125 F.3d 269, 278 (5th Cir. 1997), *cert. denied,* 525 U.S. 859, 119 S.Ct. 144, 142

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in making an informed strategic decision that turned sour. We disagree with *Combs* to the extent it implies that even after full investigation, defense counsel is strictly liable for the testimony of any expert witness he calls. *Strickland* emphasizes the danger of '20/20 hindsight,' and instructs us to gauge counsel's performance in context.

[41] We have already found permissible Gardner's conclusion that Appellant was present when the murder occurred, and distinguishable from testimony that Appellant was himself the murderer. See footnote 17.

[42] Although Appellant characterizes Wilson's analysis as "exculpatory," his opinions are more accurately described as inconclusive. Wilson could not exclude Appellant from the murder scene.

L.Ed.2d 116 (1998). As noted above, Appellant concedes that counsel's initial choice of Bevel was sound. When counsel undertakes reasonable investigation using qualified experts, we will not gauge his performance by the outcome of the expert's conclusions or testimony.[43] Appellant's trial counsel was not ineffective.[44] Proposition 6 is denied.

## DECISION

The Judgment and Sentence of the district court is **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE

| **APPEARANCES AT TRIAL** | **APPEARANCES ON APPEAL** |
|---|---|
| MACK K. MARTIN<br>J. DAVID OGLE<br>ATTORNEYS AT LAW<br>119 N. ROBINSON,<br>SUITE 360<br>OKLAHOMA CITY, OK 73102 | CLARK O. BREWSTER<br>ROBERT NIGH, JR.<br>ATTORNEYS AT LAW<br>2617 E. 21st STREET<br>TULSA, OK 74114<br>& |

[43] Appellant asks us to compare the full testimony of one expert against the more limited affidavit of another. Of course, there is no way to determine exactly how defense-favorable the new expert's findings might be without subjecting the expert to cross-examination at trial. This illustrates the danger of gauging trial counsel's performance after the fact.

[44] Because we find trial counsel's performance was not deficient, we do not reach *Strickland's* prejudice inquiry. *See Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071.

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**OPINION BY JOHNSON, P.J.**
LILE, V.P.J.: CONCURS IN RESULTS
LUMPKIN, J.: SPECIALLY CONCURS
CHAPEL, J.: SPECIALLY CONCURS
STRUBHAR, J.: CONCUR

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**CHAPEL, J., SPECIALLY CONCURRING:**

I agree that Hamilton's conviction and sentence for the murder of his wife should stand. I write separately to address two issues. First, I find unnecessary the majority's comments on direct and circumstantial evidence. While there was plenty of direct evidence on collateral issues in this case, only circumstantial evidence was presented on the crucial question of whether Hamilton committed this murder. As I have said before, "a defendant's testimony does not provide direct evidence unless he includes actual

direct evidence of the crime."[1] Our settled case law thus requires us to use the circumstantial evidence test – whether the evidence excludes every reasonable hypothesis other than guilt.[2] This test was easily met here. The majority's discussion regarding the merits of direct and circumstantial evidence is not only murky, it serves no purpose. In addition, I disagree with its apparent conclusion that there is no substantive difference between direct and circumstantial evidence. It is true that either type of evidence is sufficient to support a conviction. However, our different evidentiary standards are based on the commonsense fact that circumstantial evidence is inherently less reliable than eyewitness evidence. Criminal trials result in a finding of guilt and, usually, a loss of liberty and privileges of citizenship. Given these consequences, where the State has no direct evidence that a defendant committed a crime, the standard for evaluating the sufficiency of the evidence should be different.

I also agree that the blood spatter evidence was admissible. However, I object to the suggestion that this evidence is scientific. While scientific disciplines like biology, physics or chemistry may be involved in blood spatter analysis, neither party's witnesses were qualified as experts in those scientific areas. There is nothing wrong with an experienced police officer giving his opinion regarding his observations of blood spatter in order to aid

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[1] *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 305 n. 7, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282. See *Hooper v. State*, 1997 OK CR 64, 947 P.2d 1090, 1103, *cert. denied*, 524 U.S. 943, 118 S.Ct. 2353, 141 L.Ed.2d 722 (1998); *Mollett v. State*, 1997 OK CR 28, 939 P.2d 1, 9, *cert. denied*, 522 U.S. 1079, 118 S.Ct. 859, 139 L.Ed.2d 758 (1998); *Hill v. State*, 1995 OK CR 28, 898 P.2d 155, 156.

[2] *Hooks*, 19 P.3d at 305.

the jury in determining what may have happened at a crime scene. However, it steps over the line to say this evidence is scientifically reliable. Blood spatter evidence is not science. Jurors tend to give more weight to evidence presented as "scientific" – that is one reason courts must be scrupulous in determining that evidence's admissibility. We should not give that air of importance to evidence which is not scientific.

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**LUMPKIN, JUDGE: SPECIALLY CONCUR**

I compliment Judge Johnson on a thorough, well-written opinion in this case. I especially appreciate his insightful analysis of the issue of direct and circumstantial evidence. Using his analysis as a springboard, this Court should go further, in the appropriate case, and adopt a unified *Spuehler*-type approach to evaluating the sufficiency of the evidence in all cases on appeal, whether they contain both direct and circumstantial evidence, or whether they contain entirely circumstantial evidence. *See White v. State,* 900 P.2d 982 (Okl.Cr.1995) (Lumpkin, J., specially concurring). A unified approach would be clearer, more concise, and be supported legally by viable precedent.

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| THE STATE OF OKLAHOMA, | ) | |
| Plaintiff, | ) | NO: CF-01-1147 |
| v. | ) | DOB: 02-27-1948 |
| JOHN BAXTER HAMILTON, | ) | SSN: 444-48-7839 |
| Defendant. | ) | |

JUDGMENT AND SENTENCE

(Filed Jan. 8, 2002)

Now, on this 8th day of January, 2002, this matter comes on before the undersigned Judge, for sentencing and the Defendant, John Baxter Hamilton, appears personally and by Attorneys Mack Martin and David Ogle, the State of Oklahoma represented by C. Wesley Lane II and Connie Pope and the defendant, having previously been found guilty by a jury of the crime of:

Count 1: Murder in the First Degree 21 O.S. § 701.7

It is THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that the Defendant, John Baxter Hamilton, is guilty of the above described offense and is sentenced as follows:

Count 1: Life Imprisonment without the possibility of parole.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED BY THE COURT that in addition to the preceding terms, the defendant is also sentenced as follows:

The defendant shall pay actual court cost as determined by the Oklahoma County Court Clerk.

The defendant shall pay VCA in the amount of $1,000.00.

IT IS FURTHER ORDERED that judgment is hereby entered against Defendant as to the fines, costs and assessments set forth above.

The Court further advised the Defendant of his rights and procedure to appeal to the Court of Criminal Appeals of the State of Oklahoma, and that if he desired to appeal and was unable to afford counsel and a transcript of the proceedings, that the same would be furnished by the State subject to reimbursement of the cost of representation in accordance with Sec. 1355.14 of Title 22.

In the event the above sentence is for incarceration in the Department of Corrections, the Sheriff of Oklahoma County, Oklahoma is ordered and directed to deliver the Defendant to the Lexington Assessment and Reception Center at Lexington, Oklahoma, and leave therewith a copy of this Judgment and Sentence to serve as warrant and authority for the imprisonment of the Defendant as provided herein. A second copy of this Judgment and Sentence to be warrant and authority of the Sheriff for the transportation and imprisonment of the Defendant as herein before provided. The Sheriff to make due return to the Clerk of this Court, with his proceedings endorsed thereon.

Witness my hand the day and year first above mentioned.

/s/ Ray C. Elliott
RAY C. ELLIOTT
JUDGE OF THE DISTRICT COURT

(SEAL)

ATTEST: PATRICIA PRESLEY, Court Clerk

/s/ Tonya Lewis Deputy Clerk

CLERK'S CERTIFICATION OF COPIES

I, Patricia Presley, Clerk of the District Court of Oklahoma County, State of Oklahoma, do hereby certify the foregoing to be true, correct, full and complete copy of the original Judgment and Sentence in the case of the State of Oklahoma vs. John Baxter Hamilton, as the same appears of record in my office.

WITNESS my hand and official seal this 8 day of Jan 2002.

/s/ Patricia Presley
(SEAL) PATRICIA PRESLEY,
Court Clerk

By /s/ [Illegible]
Deputy Court Clerk

SHERIFF'S RETURN

I received this Judgment and Sentence the ____ day of _____, 200___, and executed it by delivering the Defendant to the Warden of the Lexington Assessment and Reception Center at Lexington, Oklahoma, on the _____ day of _____, 200___. I also certify

the above prisoner has served _____ days in the County Jail on the present charge or charges.

_____
Sheriff

_____
Deputy Sheriff

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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JOHN BAXTER HAMILTON,

Petitioner-Appellant,

v.

RANDALL G. WORKMAN, Warden,

Respondent-Appellee.

No. 06-6212
(D.C. No. 04-CV-1392)

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ORDER

Filed March 23, 2007

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Before **TACHA**, Chief Judge, **KELLY** and **O'BRIEN**, Circuit Judges.

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Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

by: /s/ [Illegible]
Deputy Clerk

**United States Court of Appeals for the Tenth Circuit**
**OFFICE OF THE CLERK**
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Elisabeth A. Shumaker
Clerk of Court

Douglas E. Cressler
Chief Deputy Clerk

March 23, 2007

NOTIFICATION OF MAILING

Re: 06-6212, Hamilton v. Workman
Dist/Ag docket: 04-CV-1392

A COPY OF THE ATTACHED ORDER HAS BEEN PLACED IN THE UNITED STATES MAIL THIS DATE, ADDRESSED AS FOLLOWS:

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J.C.
DEPUTY CLERK